167-467

167-467

289.

TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 364.

JOHN G. WARNER,

Appellant,

versus

THE CITY OF NEW ORLEANS,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT,
EASTERN DISTRICT OF LOUISIANA.

L. GRAHAM & SON, LTD., 44-46 BAUDIN ST., NEW ORLEANS.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF LOUISIANA.

No. 12,350. In Equity.

JOHN G. WARNER,
Appellant,

versus

THE CITY OF NEW ORLEANS,
Appellee.

RICHARD DEGRAY, JOHN D. ROUSE and WILLIAM GRANT, Esquires, for John G. Warner, Appellant.

E. A. O'SULLIVAN, Esq., City Attorney, and BRANCH K. MILLER, Esquire, for City of New Orleans, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION, TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FIFTH CIRCUIT, RETURNABLE WITHIN THIRTY (30) DAYS FROM THE 4TH DAY OF MARCH, A. D. 1895, AT THE CITY OF NEW ORLEANS, LOUISIANA.

TRANSCRIPT OF APPEAL.

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Circuit Court of the United States, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350. In Equity.

Bill in Equity.

Filed Nov. 26, 1894.

To the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana:

John G. Warner a resident of the city of Brooklyn and a citizen of the State of New York, brings this his bill on his own behalf as well as on behalf of all other parties holding obligations of the same nature and kind as your orator, who may intervene for their interest herein and may contribute to the costs, expenses and counsel fees incurred in this suit, whose names are numerous and are unknown to your orator, against the city of New Orleans, a municipal corporation of the State of Louisiana and a citizen of said State.

And thereupon your orator complains and says, that by Act No. 165 of March 18th, 1858, the Legislature of said State provided for the leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, the boundaries whereof are fully set forth in said act—which is made part hereof—and said lands were divided into three draining districts, which were respectively designated, as the First, Second, and Third Draining Districts, to which, pursuant to a subsequent act of said Legislature, a Fourth Draining District was added —which will be noticed hereafter—that for the purpose of carrying out the provisions of said act, it was provided by the second section thereof, for the appointment of Board of Draining Commissioners for each of said districts, who were by the fourth section of said act invested with all the rights and powers necessary to drain said several draining districts, and to that end were allowed at all times to enter the lands within said districts, to place en-

gines and machinery thereon to dig drains, to make necessary embankments, and levees, and generally to do all things necessary to be done in draining and reclaiming the lands within said districts, and said boards of commissioners by the fifth section of said act were authorized to sue and be sued.

2. And your orator further shows that by the 7th section of said act said boards of commissioners were each empowered to levee, drain and reclaim in their respective districts as follows: whenever either of said boards of commissioners were ready and prepared to drain their respective sections or districts, such board was directed to cause a plan thereof to be made, accurately designating the limits of the section or district to be drained as far as possible, the subdivisions of the property therein contained and the names of the proprietors, also the dimensions and directions of the canals to be dug, and the place where the steam engines would be placed, which plan or plans were to be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted in French and English, in two newspapers, once a week for four successive weeks, announcing that said boards of commissioners would proceed to drain such sections, and describing the place where the plan was deposited, accurately defining the limits thereof, and indicating as nearly as possible the time when the draining thereof would be completed, and the possible cost of the work; and said section further provided, that after the publication aforesaid, that said boards of commissioners should apply by petition to one of the courts in said parish of Orleans for the portion of the section or district lying within the limits of said parish, and to the District Court in the parish of Jefferson for that portion of the section or district lying within the limits of said parish, which court or courts, were directed upon due proof having been made of the publications and notices aforesaid, to decree, that each portion of the property situated within said limits was subject to a first mortgage, lien, and privilege in favor of such boards of commissioners for such an amount as might be assessed upon such section or district, and interest thereon, at six per cent per annum

from demand thereof, which decree of the District Court of the parish of Orleans was directed to be recorded in the office of the recorder of mortgages for said parish, and the decree of the District Court for the parish of Jefferson was directed to be recorded in the office of the recorder of said parish, which lien, privilege, and first mortgage, it was further declared by said section should take precedence over all mortgages, liens, privileges, whatsoever, whether tacit, conventional, legal or judicial, and should attach to the property until the amount assessed and the interest thereon should be fully paid.

3. And your orator further shows that by the eighth section of said act said boards of commissioners were, each within their respective districts or sections, given the right and authority and power to levee such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act, as applicable to its particular district, which assessment was to be collected from time to time, as the wants of such boards might require; and by the ninth section of said act it was provided that for non-payment of said assessments, judgments should be recoverable therefor before any court of competent jurisdiction and the lands assessed should be sold according to law.

4. And your orator further shows that an act supplementary to the above act, No. 165, approved March 18, 1858, was duly passed by the Legislature of Louisiana, and approved March 17, 1859, being No. 191 of that year, by which it was enacted in the first section thereof, that that to enable said boards of commissioners to carry into effect the provisions of said Act No. 165, approved March 18, 1858, and to commence the works therein contemplated, that each of said boards of commissioners should have power and authority to issue bonds in the sum $500, having not more than thirty years to run and bearing interest, not exceeding 8 per cent. per annum, to be designated "draining bonds," which were not for any one district to exceed $350,000; and by the second section of said supplementary act, it was provided that it should be

the duty of said boards of commissioners, upon issuing the bonds aforesaid, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of each board or boards, in accordance with the provisions of the aforementioned original act, approved March 18, 1858, and fix and apportion the amount to be paid yearly, by the owners of said lands in order to pay the annual interest on said bonds as might mature, and the manner of redeeming such bonds was provided for in other sections of said act, as will appear from a reference thereto which is made a part hereof.

5. And your orator further shows that the Legislature of the State of Louisiana, by act approved March 1, 1861, being No. 57 of that year, and entitled "An act to provide for the collection of the assessments for drainage, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the supplementary act thereto of March seventeenth, eighteen hundred and fifty-nine," enacted that the amounts of assessments, which the boards of the several draining districts were authorized to affix and apportion, to be paid yearly by the owner or owners of the land within said districts, in order to pay interest on the bonds issued, or to be issued by said boards of commissioners, and such bonds as might mature by virtue of the second section of said supplementary Act No. 191, approved March 17, 1859, should be collected and sued for as follows, to-wit: as soon as any assessments had been made notice thereof should be given, a copy thereof should be filed in the Third District Court of New Orleans for all the assessments on the property within the limits of the parish of Orleans, and in the Third Judicial District Court sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, and on which tableau of assessments thus to be filed the property assessed should be set forth with the amounts assessed, and the names of the owners thereof, if known, and if the owners' names were unknown, then it should be so stated in said assessment roll that the property assessed belonged to owners unknown; that a petition should be filed with said assessment roll praying for an order that all persons whom it might concern do show cause within thirty days

from the first publication of said order, if any they had, why said assessment roll should not be approved and homologated; that said order thus rendered should be published in the French and English languages at least twice a week for thirty days, in one newspaper published in New Orleans, as to the order of the Third District Court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the Third Judicial District Court sitting at Carrollton, and that after said publications the said courts should, on motion of counsel of said boards of commissioners, approve and homologate said assessment rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings, and that the court should at the same time and in the same judgment order the delinquent parties to pay 10 per cent. in addition to the amount assessed, to pay costs and counsel fees.

6. And your orator further shows that afterwards, to-wit: in the year 1871, the Legislature of the State of Louisiana, by Act No. 30 of that year, authorized and empowered the Mississippi & Mexican Gulf Ship Canal Company, a corporation then existing and domiciled in the city of New Orleans, to excavate drainage canals, and build protection levees within the limits of New Orleans and Carrollton, on certain terms and conditions expressed in said act, and by the second section thereof said company was authorized and empowerd to dig a canal and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city and near the shore of Lake Pontchartrain, the exact location of said canal and levee, and of all canals to be dug and levees to be built by said company to be designated and fixed by the board of administrators of said city of New Orleans, and by the fourth section of said act, said Mississippi & Mexican Gulf Ship Canal Company was authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee along the lake with the Mississippi river, of a sufficient size to fully protect the city from overflow, and on a line to be designated by said board of administrators of said city, and to construct a like canal and protection levee

above the city, the dimensions and locality in like manner to be designated by said board of administrators, the object of these two canals and protection levees being the protection from overflow, of the area between the Mississippi river, Lake Pontchartrain, and said lower and upper protection levees; and by the fifth section of said act said canal company was authorized to dig all the smaller canals required for the drainage of New Orleans and the lands in the rear of the city, of the dimensions of ten feet or more in width; and by the sixth section of said act, it was the duty of said board of administrators of the city of New Orleans, immediately after the passage of said act, not only to locate the lines of the canals and protection levees specified in the various sections of said act, but they were also required to build and run all pumps and drainage machines necessary to lift the drainage water from the said canals over into Lake Ponchartrain and keep the water in said canals in process of excavation as far as practicable at a proper level for the work of excavation, and at the same time assist the draining of the adjacent lands; and by the eighth section of said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed by said board of administrators for the purpose, to examine the work done by the said Mississippi & Mexican Gulf Gulf Ship Canal Company during each month, and upon measurement of the width and depth of the canals, or parts of canals, dug and protection levees built to certify as to the cubic yards excavated and the number of cubic yards of protection levees built during said month, and that it should be the duty of the administrator of accounts on the presentation to him of said certificates of the city surveyor, or engineer appointed as aforesaid, to draw a warrant or warrants on the administrator of finance in payment of the work so done, at the rate of fifty cents per cubic yard for excavation, and fifty cents per cubic yard for the protection levees built, the said warrants to be of such denominations as might be required by the president of said company, and these warrants it was the duty of the administrator of finance to pay on presentation to him in case there was any fund in the treasury to the credit of the said Mississippi & Mexican Gulf Ship Canal

Company, but should there not be sufficient funds to cash said warrants, then said administrator of finance was by said act required to endorse upon the same the date of presentation, after which date the said warrant or warrants bore interest at the rate of 8 per cent. per annum until paid; and by the ninth section of said act it was enacted that in order to provide funds for the payment of work to be done by the said company, that the three boards of commissioners for the draining districts of New Orleans and Jefferson established under acts of March 18th, 1858, March 17th, 1859, and the several acts amendatory thereof, and any and all other person or persons or corporations who might have been in possession, should transfer to the board of administrators of New Orleans, all money, assessments, and claims for drainage in their hands or under their control, all titles to real estate, all books, plans, tableaux and judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of drainage commissioners against the city of New Orleans to be adjudicated and settled out of the money collected by the city of New Orleans and pertaining to said drainage districts, and that the board of administrators of New Orleans should be and were were thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of said several drainage districts or any other corporation charged with the duty of draining and leveeing within the limits of the city of New Orleans and Carrollton and the said board of administrators were directed to collect from the holders of property within said drainage districts the balance due on the assessments as shown by the books of the first, second, and third drainage districts under acts of March 18, 1858, that of March 17th, 1859, and the several supplementary and amendatory acts thereto, and which assessments were thereby confirmed and made exigible, and further, to make assessments of two mills per superficial foot in those parts of the drainage districts as existing and created by said acts of March 18, 1858, and March 17th, 1859, and amendments thereto, and on such other lands as should be brought within the protection levees contem-

plated by said Act 30 of 1871, where no assessments had been made, and to execute and enforce the same as provided by the several acts of the Legislature creating and regulating said boards of drainage commissioners, and that all money received by said boards of administrators from the said commissioners of drainage, the collection of claims for drainage then due, from the collection of assessments, and from any of the sources of revenue contemplated by the provisions of the aforesaid section nine, should be placed to the credit of said Mississippi & Mexican Gulf Ship Canal Company, to be held as a fund to be applicable to the drainage of New Orleans and Carrollton (which was a virtual consolidation of all of said districts and said additional territory brought within said protection levees), in accordance with the provisions of said act, and that all property not money, so received, should be held in trust for the payment of said Mississippi & Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage, provided, that all the rights and powers and facilities possessed and enjoyed by said boards of administrators of New Orleans relative to drainage should be so construed as not to conflict with the rights, facilities acquired by said company in excavating canals and building levees, as stipulated in the various sections of said act; and the twelfth section provided that said act should be favorably construed so far as to favor all the purposes and objects of said act, and the operations and provisions thereof, all of which will more fully appear by reference to said Act No. 30 of the year 1871, which is made a part hereof.

7. And your orator further shows that on the 7th of February, 1872, under and pursuant to said Act 30 of 1871, said board of administrators of the city of New Orleans adopted an ordinance creating the fourth drainage district, which embraced those other lands not embraced within the first, second and third draining districts, but were brought within the protection levees contemplated by said act where no assessments had been made or levied, as will more fully appear by reference to a copy of said ordinance herewith filed and made part hereof and marked Ordinance No. 1359."

8. And your orator further shows that said boards of drainage commissioners were duly appointed, qualified and entered upon the duties imposed upon them by the various acts of the Legislature herein before referred to, for the first and second drainage districts, and pursuant to said acts, respectively prepared, filed and deposited in the office of the recorders of mortgages of the parishes wherein the land to be drained was situated, their plans, designating the lands therein to be drained, the subdivisions of the property therein contained, the names of the proprietors, the dimensions and directions of the canals and the places where the engines were to be located; and after due publications of the notices as required by said acts that said commissioners would proceed to drain said lands, naming the place of deposit of said plans and defining the limits of the lands to be drained, and including as nearly as possible the time required for the completion and the probable cost of the drainage; and on the petition of said commissioners, decrees were rendered by the district courts designated by said acts, that such portion of said property within the limits of the section or district to be drained, and exhibited by the plans was subject to a first lien, privilege, and mortgage, in favor of said commissioners for such amounts as might be assessed upon said property for its part of the costs of drainage, with interest thereon with six per cent. per annum from demand, and subsequent like liens, privileges and mortgages were decreed at the suit of the board of administrators of New Orleans in said third and fourth drainage districts, said decrees, the courts rendering the same, the dates of rendition and the title of the proceeding are as follows, to-wit:

The judgment "in the matter of the commissioner of of the first draining district, praying a decree of mortgage privilege, etc.," rendered by the Third District Court of New Orleans in suit No. 16,269 on the docket of that court on the 24th day of August, 1861; the judgment "in the matter of the commissioners of the second draining district praying for a decree of mortgage privilege, etc.," rendered by the Third Judicial District Court of Jefferson in suit No. 1938, on the docket of that court rendered and signed on the 29th of April, 1861; the judgment "in the

matter of the board of commissioners of the second draining district praying, etc.," rendered by the Third District Court of New Orleans, in suit No. 15,846 on the docket of said court rendered and signed on the 9th day of February, 1861; the judgment "in the matter of the city of New Orleans praying for a decree of mortgage privilege, etc." upon property in the third draining district (said city acting under said Act 30 of 1871), duly rendered by the Eighth District Court, parish of Orleans, being No. 7482 on the docket of that court, on the 4th day of May, 1872; and the judgment "in the matter of the board of administrators praying for a recognition of mortgage and recovery of assessments in the fourth draining district," —said board of administrators herein also acting under said Act 30 of the year 1871—rendered by the Superior District Court, Parish of Orleans, in suit No. 807 on the docket of said court, on the 29th day of January, 1873, and signed on the 3d day of February, 1873, copies of judgments are herewith filed and marked ex-exhibits "A." "B." "C." "D." and "E." and which were respectively recorded in the mortgage office where the land to be affected thereby was situated, as follows, to-wit: 1st drainage district, in the mortgage office for the parish of Orleans, April 17, 1872; and April 6, 1882: second draining district, parish of Jefferson, April 29, 1861 and December 12, 1871; second draining district, parish of Orleans, April 11, 1861, and December, 1871; third draining district in the mortgage office for the parish of Orleans, May 11, 1872, and April 6, 1892; and in the fourth draining district, in the mortgage office for the parish of Orleans, February 8, 1873.

9. And your orator further shows that under the authority conferred by the aforesaid acts of the Legislature the board of commissioners of the first draining district on the 12th day of September, 1861, levied an assessment of 3 3-10 mills per superficial foot on the lands within said district, to pay the cost of drainage directed by said acts; that on the 11th of March, 1861, the board of commissioners of the second drainage district levied an assessment of two mills per superficial foot on the lands of said district to pay the cost of drainage of said lands

under the same authority; that on the 11th of June, 1872, the board of administrators of the city of New Orleans, then vested with power to make assessments by virtue of said Act 30 of 1871, levied an assessment of two mills per superficial foot on all lands within said third district to pay the cost of draining said lands; and on or about the 20th of November, 1872, the said board of administrators, in the exercise of the authority conferred by said Act 30 of 1871, levied an assessment of two mills per superficial foot on lands within the aforesaid fourth draining district, to pay the cost of draining said lands, all of which will more fully appear by reference to the resolutions of said boards of commissioners and ordinances of the common council of said city of New Orleans, copies of which are herewith filed and made part hereof, and marked respectively "Assessment 1," "Assessment 2," "Assessment 3" and "Assessment 4."

10. And your orator further shows that the tableaux required by the provisions of said Act No. 57 of the year 1861, exhibiting the amounts assessed for such drainage, the names of the owner of the lands as known, and where unknown stating the owners were unknown, were duly filed in the courts hereinbefore mentioned in accordance the provisions of said act, and on motion and after due publication of said orders that all persons concerned show cause why said assessment rolls should not be approved and homologated, said tableaux or rolls of assessment were duly homologated and approved by judgments of said courts, which by the terms of said Act No. 57 of 1861 were and are judgments against the aforesaid lands as well as the owners thereof, for the amounts assessed and 10 per cent. costs and counsel fees and said judgments, the titles of the proceedings, the courts rendering the same, and the dates of rendition are as follows: "In the matter of the commissioners of the first draining district, etc., No. 17,828, Third District Court, parish of Orleans, homologating the assessment rolls for said district, for the first instalment of 10 per cent. thereof, rendered March 11, 1863, and No. 25,935, Superior District Court for the parish of Orleans, for the remaining nine instalments, from the second to the tenth, both inclusive, was rendered March 21, 1874.

"In the matter of the commissioners of the Second Draining District, praying," etc., No. 1938, the judgment homologating the assessment roll of said district, above Toledano street, New Orleans, was rendered by the Third Judicial District Court for the parish of Jefferson on the 15th and signed on the 23d March, 1869.

"In the matter of the commissioners of the Second Draining District, praying," etc., No. 15,846, the judgment homologating the assessment rolls of said district below Toledano street, New Orleans, was rendered by the Third District Court for the parish of Orleans on the the 11th and signed on the 16th November, 1868.

"In the matter of the city of New Orleans, praying for the homologation of assessment roll," etc., for the Third Draining District, the judgment homologating said assessment rolls was rendered on the 8th and signed on the 13th day of November, 1872, by the Eighth District Court of the parish of Orleans.

"In the matter of the Board of Administrators, praying for a recognition of mortgage and recovery of assessments in the Fourth Draining District," No. 807, the judgment of homologation of the assessment rolls for said district was rendered on the 15th and signed on the 18th of March, 1873, by the Superior District Court of the parish of Orleans, all of which judgments are specially referred to for greater certainty, and copies of the same are made part hereof and are marked respectively, "Homologation 1," "Homologation 2," "Homologation 3," "Homologation 4" and "Homologation 5;" all of said courts so rendering said judgments, outside of said Third District Court, having become possessed of jurisdiction over said matters under authority conferred on them by the Legislature of the State passed subsequent to said Act No. 57 of 1861. And for the revival of all of which judgments, as a matter of excessive precaution and not because the same were necessary proper proceedings were in proper time taken in the proper courts and are still pending therein.

11. And your orator further shows that said board of administrators complied with said Act 30 of the year 1871, and took possession of all the money, rights, privileges, properties and powers conferred on them, and became

possessed of all the means necessary to carry out the objects of the statutes aforesaid and provide for the payment of all drainage warrants that might be issued under said Act 30 of 1871 and that the amount of assessments handed over to said city of New Orleans, in the 1st and 2d draining districts was $790,621.42, and the amount of assessments levied and reduced to judgment at the suit of the city of New Orleans in said 3d and 4th draining districts, after she came in control under said Act No. 30 of 1871, was $909,915.74, making a total of $1,699,637.16 of which there was assessed against the city of New Orleans on streets and squares as follows: 1st District, $223,110.60; 2d District, $199,885.47; 3rd District $207,441.46; 4th District $65,956.77, and on which assessments there had been collected from individuals by said city of New Orleans, between the time she took charge as aforesaid and the 7th day of June, 1876—the date of the sale from Van Norden and said canal company hereinafter referred to—in cash $78,748.51, and $151,174.18 in drainage warrants, paid in pursuance of an ordinance No. 2460 hereto annexed and made part hereof, leaving outstanding and due on the books and records a balance of $1,469,714.47, including said sums due by the city of New Orleans on said assessments levied on her streets and squares as aforesaid.

12. And your orator further shows that on the 22nd day of May, 1872, said Mississippi & Mexican Gulf Ship Canal Company, by act before Andrew Hero, notary public, for a good and valuable consideration therein expressed, did assign, transfer and set over to Warner Van Norden all and singular the right, title and interest, claim and demand of said canal company in and to the privileges and advantages granted to it under the aforesaid Act No. 30 of 1871, as will more fully appear by reference to a copy of said act herewith filed and made part hereof; and on the 22nd day of November, 1872, said canal company by another act before the same notary, for a valuable consideration therein expressed, did sell and deliver unto said Van Norden all of its dredge boats, derricks, flatboats and other property used in dredging, as will more fully appear by reference to a copy of said act of sale herewith filed and made part hereof.

13. And your orator shows that from the time said board of administrators took possession and charge in June, 1871, pursuant to said Act 30 of 1871, a vast amount of drainage work was done by said canal company and said Warner Van Norden, transferee thereof; twelve miles of old canals were widened and deepened, and thirteen miles of new canals were dug, and a corresponding amount of protection levees were built, and in the doing of which over 5,000,000 cubic yards of earth were handled, and the work so done by said company and said Van Norden, transferee, was in all respects conformable to the acts of the Legislature and the designs of said board of administrators, who duly approved and accepted all work done, and was adequate to secure said proposed drainage, and only required the completion of a gap on the shore of Lake Pontchartrain, and the placing in position of the pumping engines on said lake shore—which it was the duty of said city of New Orleans to do under said Act 30 of 1871 to complete the entire system.

14. And your orator further shows that by Act No. 16 of the Legislature of Louisiana, approved March 24, 1876, and made part hereof, the city of New Orleans was authorized and empowered to contract with said Mississippi & Mexican Gulf Ship Canal Company and said Van Norden, as transferee thereof, for the purchase of its said transferee's rights, franchises, tools, implements, machines, and boats and apparatus, the purchase price to be paid in drainage warrants, payable out of drainage taxes imposed under the various acts of the Legislature herein above set forth, and after due appraisement, on the 6th day of June, 1876, said purchase was made by said city by notarial act (a copy of which, as well as of an inventory of the property sold, and the ordinance under which said inventory was made, are hereto annexed and made part hereof, and marked "Transfer 1" and "Inventory 1," and Ordinance No. 3479, A. S.), the city receiving from said company and said transferee, said boats, machinery, implements and apparatus of great value, for which it agreed and bound itself to pay in drainage warrants $300,000.00 which were delivered to said Van Norden transferee as aforesaid, pursuant to Ordinance No. 3539 A. S. copy of which is annexed and made part

hereof, and of which your orator is now the owner and holder of three, of $2000 each, by him endorsed (a copy of one of which is also annexed and made part hereof) all dated June 6th, 1876, upon which this suit is brought, as well as upon the assignment, transfer and subrogation of said Warner Van Norden to your orator, of all his right, title and interest in and to said warrants, as well as of each, any and all right or rights of action which he had or has against said city of New Orleans arising in his favor out of said act of sale of said June 7th, 1876, or the action of the city of New Orleans thereunder by reason of its failure to collect said drainage taxes out of which said warrants given for the purchase aforesaid were payable, or by reason of the failure of the city of New Orleans to complete said drainage work, to the end that said taxes might all be collectible, so as to pay said warrants given for said purchase, or for any other reason, of which a copy is herewith filed and marked "Assignment 1," and he brings this suit not only for himself, but for such other holders of said drainage warrants, given for the purchase aforesaid, as may under the invitation hereinbefore extended make themselves parties to this suit.

15. And your orator further shows, that said Van Norden, at the time of parting with said drainage warrants in the year 1876, as well as at the time of making said assignment and transfer marked "Assignment 1" was, and now is at the time of bringing this suit, a citizen of the State of New York and could bring this suit in this Hon. court.

16. And your orator futher shows that said act of the Legislature of Louisiana of February 24, 1876, being No. 16 of that year, providing for the payment of the purchase price of said dredgeboats, tools and implements, by the issuance and delivery of drainage warrants, payable out of drainage taxes, was a new destination of said taxes by the Legislature of the State as they then stood, which could not be diverted until said drainage warrants, so given as aforesaid, were fully paid, and placed said taxes beyond any claim that might be urged against them by the city of New Orleans, or any other party or person whomsoever, and especially as said city became the absolute owner of said dredgeboats, franchise and im-

plements without paying any of her own money or property, or giving any personal obligation therefor.

17. And your orator further shows that after said purchase, said city of New Orleans alone, became possessed of the sole power, authority, as well as the necessary tools and outfit to complete the contemplated system of drainage, and in fact construct and conplete any system of drainage, and had the duty cast upon her to complete said system, or build and complete some other system of drainage, but from the very date of said purchase in June, 1876 (and notwithstanding said drainage work had, from the very commencement thereof by said canal company in 1871, and the prosecution thereof by Van Norden as transferee of said company, from May, 1872, been proceeded with, with great vigor and over two-thirds thereof had been completed) said city of New Orleans ceased all work on said system, and never thereafter commenced or prosecuted any other, but sold some of the boats and machinery so purchased as aforesaid, diverted the proceeds of taxes from other purposes than the payment of drainage warrants, allowed other of said boats to rot and sink unused, and all notwithstanding all were in a first-class condition when received from said vendor, with all the outfit in duplicate parts, so that if any was broken or gave way, a counterpart was on hand to take its place, and which with reasonable care would have been useful for ten years from the date of said purchase, and thus rendered herself incapacitated for the completion of the drainage work aforesaid or for any work of drainage whatsoever, and allowed the canals dug by said company and its transferee to fill and remain filled with filth and sediment, and thus became useless and worthless, and in fact destroyed the vast amount of work already done to a very large extent.

18. And your orator further shows that ever since said purchase by said city she has done nothing to compel or enforce the collection and payment of drainage taxes, and but one execution has been issued on said drainage tax judgments since June, 1876, and when this was enjoined by a preliminary injunction, no steps have ever since been taken to have said injunction tried or disposed of, and in fact said city has done nothing toward the collection of

said taxes but keep an office open in the City Hall where the agent of Van Norden might try to induce drainage tax debtors, by persuasion to pay their taxes, where your orator has been informed some taxes have been paid but the amount thereof is unknown to your orator, and the same have never been accounted for, and finally after this system of inaction and supineness, said city of New Orleans on the 5th day of April, 1881, adopted by its Common Council an ordinance, and had the same published in the daily press of New Orleans, instructing its mayor to issue, and in pursuance thereof he did issue and publish his proclamation advising drainage taxpayers not to pay their taxes (which had a most disastrous effect upon the payment thereof), and by reason of her conduct in not completing the said system of drainage or *and* because thereof, and because she had not adopted any other system of drainage, to drain the land whereon said assessments were imposed and remained unpaid, the Supreme Court of Louisiana, in the case of Davidson vs. New Orleans, in March, 1862 (34 La. Ann. p. 170 to 178) decided said drainage taxes could not be enforced and collected, and this decision, from the date thereof, has become the settled jurisprudence of the State, and been the basis of many suits in the courts of Louisiana, in which large amounts of drainage taxes have been erased and canceled, and all the balance thereof remaining unpaid have become of little or no value; and after the rendition of said Davidson decision said city of New Orleans, on the 15th of May, 1883, in the further prosecution of its purpose to destroy said drainage taxes and dissuade those owing the same not to pay the same, by a report of a committee of its council, duly published, pointed out to the drainage taxpayers how under said Davidson decision they might avoid payment thereof, to-wit: By bringing proceedings against said city as trustee of said drainage taxes, and alleging that the drainage work (which it was the duty of the city of New Orleans to complete) had not been completed, and that because thereof said drainage taxes could not be enforced, which suggestion and programme so put forth by said city while trustee of said fund and the collection thereof, has ever since been largely adopted

and enforced and very large amounts of drainage taxes have been ordered erased, and have been erased and lost in consequence thereof, that when said proceedings were brought said city of New Orleans made no defence whatever, but in accordance with the determination to destroy said fund, never called a single witness to show the value of the work done and the benefits resulting therefrom, and of all of which she had full knowledge, but of the exact extent of said proceedings and the exact amount of drainage fund thereby destroyed your orator has no exact knowledge, except of one case, to-wit: the proceedings instituted to cancel and erase the drainage taxes on a portion of the land known as the Foucher tract in the 2d drainage district, to-wit: that part thereof lying on the swamp side of St. Charles street between Fabourg Greenville and Fabourg Burtheville, in the suit entitled C. E. Girardy et als. vs. Heirs of William Henry, No. 23,315 on the docket of the Civil District Court, where the city of New Orleans, although a party to said proceedings, and having full knowledge of the benefits conferred on said land and other land in the vicinity by said work of drainage, and that the same was drained never called a single witness to prove the fact but suffered the matter to go by default, and in consequence thereof on the 12th day of June, 1889, the court ordered the drainage taxes assessed against said land amounting to $11,-532.00, with 6 per cent. interest per annum from December 7, 1877, and 10 per cent. attorney's fees and costs to be erased and canceled from the drainage records and the mortgage office, which has since been done and said amount has been wholly lost to said drainage fund.

19. And your orator further shows that said city has in other ways and by other means, the details of which are at present unknown to your orator destroyed said drainage fund and discouraged, and advised against the payment of said drainage taxes, until now, as far as the courts of Louisiana are concerned, the same has become uninforcible and worthless to the holders of drainage warrants given for the purchase of the aforesaid dredgeboats, tools, implements and franchise, which said city, from the date of said purchase up to the present time, has not paid for in whole or in part in drainage taxes or otherwise pro-

vided any means for the payment of said warrants, or offered any restitution of said property, and all in express violation of an express covenant contained in said act of sale "not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of said drainage tax assessments, until said warrants should be paid in full."

20. And your orator further shows that on some occasions said city has claimed said drainage taxes as her own property and been allowed the full benefit thereof in the payment of her own debts, and especially in suit No. 2036, Civil District Court, and No. 2447, late Superior District Court for the parish of Orleans, wherein, being sued as indebted to the commissioners of the city park in a large sum of money, she claimed said sum so sued for should be credited with drainage taxes amounting to $25,725.96 assessed against another portion of said Foucher tract in said second drainage district lying between said Fabourg Greenville and Fabourg Burthville aforesaid, and between St. Charles street and the Mississippi river, which credit was allowed to said city in discharge of her own indebtedness, to the expense and loss of said drainage fund, and for which with interest at 6 per cent. per annum from the date of allowance she should account to the holders of said drainage warrants given for said purchase.

21. And your orator further shows that he is advised that said defendant now claims that she has not in her possession any funds realized from drainage tax assessments, against other property than the streets and property for which she is liable, and that none of the taxes assessed on property of private individuals is now susceptible of collection.

22. And your orator further shows that the plan for draining and reclaiming the land aforesaid, as provided for in said Act 30 of 1871, and as supplemented by the board of administrators of said city of New Orleans under the authority given, and the duty imposed on them under said act, and which they neglected and destroyed as aforesaid, was, *first*, to surround the territory embraced in said four drainage districts with immense levees to prevent any water from flooding the same from without, as follows:

on the south by the levee on the bank of the Mississippi river; on the east by a lower protection levee; on the north by the lake shore protection levee (which was to be not less than 100 feet wide at its base, and of sufficient height to completely protect said land from overflow from the lake); and on the west by an upper protection levee; and, *second*, the plan for removing all water and drainage that might accumulate within the territory so protected from overflow as aforesaid, was, to immediately inside of said protection levees above or on the west, and below or on the east, to dig immense canals leading directly into another immense canal to be dug immediately inside of said lake shore protection levee on the north, which was to be not less than 65 feet wide and 15 feet deep, which was to serve as a reservoir canal, from which the drainage emptying therein was to be pumped into said Lake Pontchartain as hereinafter stated); and into said reservoir canal other canals of large size were lead parallel with said canals inside of said upper and lower protection levees, and at proper distances, according to the topography of the land, other and smaller canals were to be dug at right angles and connecting with and emptying in said reservoir canal inside of said lake shore protection levee.

23. And your orator further shows that said levee on said bank of the Mississippi river was, and ever since the year 1871 has been sufficiently high and strong to protect said enclosed territory from any overflow from said river front and that the land on said river front to Claiborne street in said city (about one-third of the distance from said river to said Lake Pontchartrain), descends or falls towards said lake about 16 feet, while the land at said Claiborne street is only one foot higher than it is at said lake, and that to provide for this condition of things the drainage from the levee on said Mississippi river front was over the surface of the ground, and in the street gutters to Claiborne street aforesaid, where the aforesaid right angle canals running east and west, and emptying into said upper and lower protection canals were to be dug, and at proper distances continued towards said reservoir canal; and the other canals which lead northwardly from said Claiborne canal and parallel with said upper and lower protection canals and emptying into said reservoir canal

were to be begun at or near said Claiborne street canal, and were to descend from said point gradually increasing in depth until they reached said reservoir canal, at a depth of fifteen feet, thus making a complete and continuous descent or fall for drainage from the levee on the Mississippi river in front to the bottom of said reservoir canal on the inside of said lake shore protection levee in the rear, of thirty feet or more; and said reservoir canal was at all times to be kept empty and free for the flow of drainage therein. by four immense pumping engines to be built and run by the city of New Orleans (but not from drainage tax collections), on said lake shore protection levee over which they were to throw said drainage into said Lake Pontchartrain; and your orator avers that said plan or system of drainage was well devised, wise, complete and sufficient, and had the endorsement of the ablest engineers in the country, and if carried out and completed by said city of New Orleans after the purchase aforesaid, would have protected the lands embraced within said plan from overflow from without, and would have easily, quickly and completely removed all the drainage from within the levees provided for thereby, and rendered the land fit and useful for either agricultural, residence, and business purposes, and made the same of many times the value of all drainage taxes imposed thereon, and said taxes themselves collectible and available for the payment of the drainage warrants given for the purchase aforesaid.

24. And your orator further shows that at the time of said sale by said Van Norden and said canal company to said city of New Orleans said drainage assessments then uncollected—and all exclusive of the taxes imposed on swamp land in the first and second drainage districts, which had been settled for prior to said purchase and sale—amounted to the said sum of $1,469,715.41 and that after said sale and purchase said city had not only the power and authority, the machinery and outfit, to have completed said system of drainage, or to have adopted and completed any other system, that would have drained said lands and made them available for the payment of the drainage warrants given for the purchase aforesaid, but she had in addition to all this, from the very date of said purchase, an unexhausted and

unrestrained power of taxation under which, by a tax on all the property within the city of New Orleans, she could have supplied herself with more than sufficient means to have completed said system, or any other system, but in violation of her duty and in utter repudiation of her obligations, she did at once abandon all pretence of draining in any way whatever, and destroyed the very source from which she had bound and obligated herself to pay the warrants given for said purchase, sometimes pretending that said drainage taxes were illegal and unconstitutional by reason of various acts of the Legislature of the State, to-wit: Act No. 48 of the year 1877, excluding certain lands from all liability for drainage taxes, and canceling and annulling all judgments for drainage of said lands, and all legal proceedings pending therefor, Act No. 67 of the year 1877 declaring that no judgment for drainage taxes should be collected until the property had been benefited to an extent equal to the drainage taxes imposed; and Section 42 of Act 20 of the year 1882, which undertook to abolish all laws providing for drainage, and the drainage tax assessments and judgments imposed thereunder, all of which your orator avers were illegal, null and void because repugnant to the Constitution of the United States, and especially Article 1, Section 10, and the 14th amendment of that instrument, prohibiting all legislation impairing the obligation of contracts and protecting the rights of property, and at other times pretending that said taxes were uncollectible because the lands were not worth the amounts imposed thereon—which your orator also avers is without foundation in fact—the only reason (if any) why the land on which said taxes are levied are not worth the amount of said taxes—which is denied—is because said city of New Orleans has refused to drain them, either by completing the system or by keeping the canals already dug open and clean.

25. And your orator further shows that by said act of purchase and transfer of June 7, 1876, and the stipulations therein contained, said city of New Orleans, in addition to the former duties on her imposed of trustee for the collection and payment of said drainage taxes for drainage warrants, became the voluntary and contractural

trustee for the collection of the taxes then due, and was bound to use her utmost efforts for the collection of the same under the terms of said act of sale. and to disregard all the illegal and unconstitutional acts of the Legislature aforesaid, and having failed and neglected so to do, and having done everything in her power to destroy said taxes and defeat their collection, and this notwithstanding various suits brought against her for her dereliction of duty in this regard, and especially in the face of the following cases, to-wit: John Crossly & Sons, Limited, vs. The City of New Orleans, No. 9384, U. S. Circuit Court, Eastern District of Louisiana, filed April 18, 1881, and excepted to May 11, 1881; State of Louisiana, ex rel. John Crossly & Sons, Limited, vs. City of New Orleans, filed December 28, 1881, in the Civil District Court, parish of Orleans, and subsequently removed to this Hon. court and filed therein on the 22 day of April, 1882, being now No. 9935 on the docket thereof; John Crossly & Sons, Limited, vs. The City of New Orleans, No. 10,337 on the docket of this Hon. court, filed August 24, 1883, and pleaded to Nov. 17, 1883, and James W. Peake vs. the City of New Orleans, No. 11,614 on the docket of said court, filed August 10, 1887 (the pleading in which are referred to for greater certainty, and which your orator prays may be taken as a part hereof), she has become accountable to your orator and other holders of drainage warrants for all moneys collected and not paid for drainage warrants, for all moneys misapplied, and also for such sums as might have been collected had said city done her duty in the premises, and which have become lost and wasted, because of said non-fulfilment of her duty as contractural and voluntary trustee, between the time she took charge in June, 1871, to the time a receiver was appointed by this Hon. Court in June, 1891, in suit No. 12,008, on the docket thereof, and more especially between the date of the sale aforesaid from said Van Norden and said Canal Company on June 7th, 1876, to said June 13th, 1891.

26. And your orator is advised and shows to the court that defendant the City of New Orleans—will set up and plead as a discharge to this suit that she has discharged herself from all liability to account for drainage taxes

which she has collected or ought to have collected for the benefit of the holders of said warrants, by the issue and delivery, between May 10th, 1872, and December 31st, 1874, of $1,672,105.21, of her bonds of the drainage series, issued and delivered pursuant to Section 13 of Act No. 73, of the year, 1872, or some other act, to take up drainage warrants issued for work done pursuant to Act No. 30 of the year 1871, but your orator avers that the city of New Orleans had not at any time prior to the date of said Act No. 16, approved February 24th, 1876, or prior to the execution of said contract of purchase dated June 7th, 1876, made pursuant to that act, asserted or claimed that she had ever been so discharged, but had at all times acted upon the theory that said bonds were issued in discharge of a fixed liability cast upon her by said Section 13 of said Act No. 73 of 1872, and your orator is advised and so charges that said Act No. 16 of 1876, was an authority for the city of New Orleans to purchase said drainage boats, tools, implements and franchise, and was a legislative recognition that the drainage fund as created by law, and as it stood on the records of the city of New Orleans, and as recorded in the mortgage office had not been discharged in any manner or to any extent by the issuance and delivery of said bonds, and was an appropriation of so much of said fund as would be necessary to pay the said purchase warrants without offset or impairment by reason of the issue and delivery of said bonds of said drainage series.

27. And your orator avers that the said contract of purchase was entered into in view of and in consideration of the provisions of said Act No. 16 of the year 1876, and its effect upon the rights and remedies of the said Van Norden, that neither at the time of entering into said contract, nor when said warrants were delivered in discharge of the price of the sale, did defendant disclose to said Van Norden that she would claim that the issuance and delivery of said bonds had discharged her of liability to account for and apply drainage taxes and funds—including those due by herself, to the payment of the warrants so issued to him, but on the contrary, defendant in and by said contract of sale, and the covenants therein contained,

recognized and asserted the existence of said drainage taxes as applicable to the payment of said warrants, and agreed "not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of drainage assessments as provided by law, until said warrants have been fully paid, it being well understood and agreed between the said parties hereto that the collection of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expenses as hereinbefore provided for, under any pretext whatever, until the full and final payment of the same," and said Van Norden, who was ignorant that said city claimed or would claim a discharge from liability on account of the issuance and delivery of said bonds of said drainage series, would not have entered into said contract if he had been advised that any such claim would be made as a defence herein, and so your orator is advised and avers that the defendant is now estopped in equity and good conscience from pleading or maintaining said defence; and your orator avers that he has made amicable demand upon defendant for the payment of his warrants, but without avail.

To the end therefore that said defendant may under oath, according to its best and utmost knowledge, information and belief, full, true and direct and perfect answer make to this bill and the interrogatories hereinafter numbered and set forth at the foot of this bill, and that an account may be taken of all drainage taxes, assessments, and judgments imposed and rendered under Acts No. 165 of March 18, 1858, No. 191, of March 17, 1859, No. 57 of March 1, 1861, and Act No. 30 of 1871, and the various acts of the Legislature of Louisiana supplementary thereto and amendatory thereof, and of all moneys collected by said city of New Orleans under the aforesaid acts, and of any and all other assets and property that came to said city of New Orleans under the aforesaid acts of the Legislature or any of them, as well as of each, any and all payments, disbursements and dispositions thereof, and that a further account be taken of all losses, waste of, and damage caused by said city of New Orleans to said drainage tax assessments and judgments by reason of the illegal and wrongful acts of administration, and violation of the

duties and obligations imposed on her by said act of sale of June 7th, 1876, or any of them, or from any other cause, and that the sum found to be due on said accounting with interest, may be decreed to be paid to your orator and other parties similarly situated, to the full extent of their warrants with interest thereon, and that the amount of taxes assessed as aforesaid against the city of New Orleans on her streets, squares, and public places, be specially decreed to be a trust fund in the hands of said city, applicable to the payment of said warrants of your orator and such other holders, who may avail themselves of the benefit of these proceedings and offer to pay their share of costs, expenses, and counsel fees herein, and that said city of New Orleans be decreed estopped from setting up any defence of offset thereto or payment thereof by reason of the issuance of said bonds of said drainage series issued and delivered pursuant to said Act No. 73 of the year 1872, and that your orator and said other parties similarly situated may have judgment against said city of New Orleans, for the amount of the drainage warrants respectively held by them, with interest and costs, and that he may have such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises.

May it please your Honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this Hon. Court directed to said city of New Orleans, on a day certain therein to be named, and under a certain penalty, to appear before this Hon. Court, then and there to answer all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet and agreeable to equity and good conscience, and your orator as in duty bound will ever pray.

(Signed) RICHARD DEGRAY,
ROUSE & GRANT,
Solicitors for Complainants.

Interrogatories to be Propounded to said Defendant, the City of New Orleans.

Interrogatory No. 1. What are respective amounts of drainage taxes which have been erased and canceled under order and judgment of court since the decision and

decree of the Supreme Court of Louisiana rendered in suit entitled Davidson vs. City of New Orleans, No. 8260, reported in 34th An , page 170, and following, what were the courts in which the same were so ordered to be erased and canceled, what were the titles of the cases or proceedings, and the numbers thereof, what was the description and location of the land from which said taxes were ordered to be erased and canceled, state the matter in full.

Note—The defendant, the city of New Orleans, is required to answer interrogatory No. 1.

(Signed) RICHARD DEGRAY,
ROUSE & GRANT,
Solicitors for Complainant.

Ordinance No. 1359, Creating 4 Drainage District.

Annexed to and made part of bill of complaint and filed Nov. 26, 1894.

ORDINANCE NUMBER 1359.

Ordinance creating the 4th draining district and establishing location of protecting levees.

MAYORALTY OF NEW ORLEANS,
City Hall, February 7, 1872.

Sec. 1. Be it ordained by the Council of the City of New Orleans, That in addition to the several drainage districts described in an act of the Legislature to provide "leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, there shall be and is hereby constituted a fourth district or section, to be comprised within the following described limits or boundaries, viz.:

Commencing on the left bank of the River Mississippi, at a point of intersection with Lafayette avenue, thence continuiug down said river to the point of intersection with Fisherman's canal, thence running back from said river a distance of 9,900 feet, or thereabouts, to Bayou Bienvenue and Florida Walk, thence continuing along Florida Walk for a distance of 15,914 feet or thereabouts, so as to con-

nect through a curved line of 338 feet additional with Lafayette and Peoples avenue at a point distant from the Mississippi river of 9,900 feet or thereabouts, and thence along Lafayette avenue to the place of beginning.

Sec. 2. Be it further ordained, That the Lower Line protection levee to connect the Mississippi river with Lake Pontchartrain is established as follows:

Commencing on the left bank of the Mississippi river, at the lower limit of the fourth draining section, thence back from said river to the intersection of Bayou Bienvenue and Florida Walk a distance of 9,900 feet or thereabouts; thence on the rear line of said section along Florida Walk to Lafayette and Peoples avenue a a distance of 15,914 feet or thereabouts; thence along Peoples avenue to the intersection with Mexico street, a distance of 13,434 feet or thereabouts; thence with a northwest bearing for a distance of 3,450 feet or thereabouts to the intersection of Washington avenue and the lake-shore protection levee.

Sec. 3. Be it further ordained, That this ordinance shall take effect from and after its passage.

Adopted by the City Council of the City of New Orleans, February 6, 1872.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) BENJ. F. FLANDERS, Mayor.

Exhibit "A."

Proceedings in the matter of the commissioner of the first draining district, praying a decree of mortgage privilege, etc., rendered by the Third District Court of New Orleans in suit No. 16,269 on the docket of said court on the 24th day of August, 1861.

Filed with and made part of bill, November 26, 1894.

Nos. 16,269 and 17,028 late 3d District Court, parish of Orleans transferred to No. 9189 7th Dist. Court, parish of Orleans; transferred to 25,935 Superior District Court for the parish of Orleans, transferred to No. 5758 of the Civil District Court, parish of Orleans.

To the Honorable the Third District Court of New Orleans:

(Stamps)

The petition of the Board of Commissioners of the First Draining District, through its president, N. E. Bailey, respectfully represents; that agreeably to the provisions of an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson" approved March 18, 1858, your petitioners have had a plan drawn by G. T. Beauregard, engineer of said draining district, of a certain section of land within the parish of Orleans, described in the advertisements hereunto annexed and made part of this petition—that said plan accurately designates the limits of said section and as much as possible the subdivision of property therein contained and the names of the proprietors, and also the divisions and directions of the canals intended to be dug and the places where the steam engines are to be established," that true copies of said plans were deposited in the office of the Recorder of Mortgages of the parish of Orleans, on the 4th day of May, 1861, and notices inserted in the English and French languages in the New Orleans *Commercial Bulletin* and in the New Orleans *Bee*, two newspapers published in the city of New Orleans, once a week during four weeks in succession, announcing that your petitioners were about to proceed to drain said section, describing the place where said plans are deposited, accurately defining the limits of said section, and indicating, as near as possible, the time within which the draining thereof will be completed, and the probable cost of said works; all of which will more fully and accurately appear by reference to the certificate of the Recorder of Mortgages of the parish of Orleans, and copies of said New Orleans newspapers containing said notices herewith filed.

The premises considered, your petitioners are entitled to and now pray this honorable court to render a decree subjecting each portion of the property, situated within the limits of said First Draining District, to a first mortgage privilege and lien in favor of your petitioners, the Board of Commissioners of the First Draining District,

for such amount as may be assessed on it for its proportion of the whole cost of drainage of said section, in accordance with the provisions of the statute by which said privilege lien and mortgage are created, and interest thereon at the rate of 6 per centum per annum, from the demand thereof; and your petitioners pray for all such other and further aid, relief and remedy as the nature of their case may require and the law will permit; and they will ever pray, etc.

(Signed) C. ROSELIUS,
Attorney for Petitioners.

Endorsed—No. 16,269. Third District Court of New Orleans. In the matter of the Board of Commissioners of the First Draining District praying for a decree of mortgage lien and privilege, etc. Filed Aug. 21, 1861. Signed A. Denis, Dy. Clk.

Judgment.

Proof having been made of the publications required by law and of the deposit of the plan in the office of the Recorder of Mortgages of the parish of Orleans by the Commissioners of First Draining District agreeably to the provisions of law, it is hereby ordered, adjudged and decreed that each portion of the property situated within the limits of the parish of Orleans comprised within the First Draining District, beginning at the Mississippi river at Julia street, following said street to the canal of the Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to Bayou St. John, following said bayou to Canal Carondelet, along said canal to St. Peter street, along St. Peter street to the bank of said River Mississippi, and following the bank of the said river to the starting point, be and the same is hereby subjected to a first mortgage lien and privilege in favor of said Board of Commissioners of the First Draining District for such amount as may be assessed on it, for its proportion of the whole cost of draining of said section, together with interest thereon at the rate of 6 per centum per annum from demand until final payment.

Judgment rendered and signed August 24, 1861.

(Signed) R. K. HOWELL,

Judge 6th D. C., Acting in Absence of Judge Foute.

A true copy:

DON GORDON,
Dy. Clerk, C. D. C.

Exhibit "Homologation 1."

From page 5, with copy of Assessment Rolls annexed.

Petition,

Filed Feby. 5th, 1863.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the commissioners of the First Draining District praying for the homologation of assessment roll etc.

Petition,

Filed Feby. 5, 1863.

The petition or Commissioners of the First Draining District, respectfully represents; that in conformity with the act of the Legislature entitled "An act to provide for the collection of the assessment for draining under the acts of March 18th, 1858, and the act supplementary thereto of 17th March, 1859, a tableau or assessment roll of the amount to be paid for draining the property within the said First Draining District has been prepared and notice thereof has been given.

That petitioners herewith present a copy of said assessment to be filed in this honorable court.

That in the said assessment roll the property assessed is set forth together with the amounts assessed and the names of the owners thereof as far as known and in case the owner or owners are unknown said fact is stated all of which together with other necessary particulars will more fully appear by reference to said copy of the assessment roll herewith exhibited and filed.

Your petitioners therefore respectfully pray that in

pursuance to said act of the Legislature it may please the court to order that all persons whom it may concern do show cause within thirty days from the first pub'ication of said order if any they have why said assessment roll should not be approved and homologated.

That said order be published in the English and French languages in the *Daily Delta* and the New Orleans *Bee* newspapers twice each week for thirty days. And that after due proceedings had judgment be rendered approving and homologating said assessment roll to operate as a judgment against the property assessed and the owner or owners thereof for the amount of the assessment with 10 per cent. in addition to the amount assessed to pay costs and counsel fees, the whole according to the acts of the Legislature aforesaid found at pages 43 and 44 of the printed session acts of 1861.

And your petitioners pray for all such other and further aid, relief and remedy as the nature of the case may require and the law will permit.

And as in duty bound they will ever pray, e'c., etc.

(Signed) C. ROSELIUS,
Atty. for Petitioners.

Order of Homologation and Judgment.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the Commissioners of the First Draining District praying for the homologation of the assessment roll.

Order of homologation and judgment rendered March 11, 1863.

On motion of Christian Roselius, Esq., of counsel for petitioners and on producing to the court due proof of the publication of notices to all persons interested to show cause, if any they have, why said assessment roll filed by said commissioners should not be approved and homologated was made according to law.

It is now ordered, adjudged and decreed that said report be approved and homologated as far as not opposed and to operate as a judgment against the property assessed

or the owner or owners thereof with ten per cent. in addition to the amount assessed costs of counsel fees, according to act of Legislature.

Rendered March 11th, 1863,
signed March 17th, 1863.

(Signed) E. HUSTAND, Judge.

I do hereby certify, pages five, six and seven of the foregoing pages contain a true and correct copy of a certified copy thereof to be found in Record No. 7063 of the Supreme Court of the State of Louisiana in suit entitled New Orleans Canal and Banking Company vs. The City of New Orleans on appeal from the Sixth District Parish of Orleans wherein the same was offered and filed, and the original of which can not be found among the records of the late courts transferred to the Civil District Court of the parish of Orleans.

DON GORDON,
Dy Clerk, Civil District Court.

No. 9189. Late Seventh District Court transferred into No. 16,269 of the late Third District Court transferred to 29,935 Superior District Court, transferred to the Civil District Court, No. 5758, parish of Orleans, filed April 6, 1882.

Petition.

9189. Seventh District Court for the Parish of Orleans.
No. —.

In the matter of the Commissioners of the First Draining District praying for a decree, etc.

Petition of the City and Administrators of New Orleans praying for the homologation of the assessment roll for said district.

To the Hon. T. W. Collins, Judge:

The petition of the City of New Orleans and the Administrators thereof compased of Benjamin F. Flanders, president, and John S. Walton, Alfred Shaw, Louis T. Delassige, Hubert Bonzano, James Lewis, John Cochrane and F. C. Remick residing in said city and parish, all said petitioners appearing as the representatives of the

persons assessed for the payment of the expenses of leveeing and draining of the First Draining District and representing also the interests of the State of Louisiana and of said city; and herein proceeding for the use of the persons and corporations represented as aforesaid, respecfully represents:

That in conformity with the act of the General Assembly of this State entitled "An act to provide for the collection of the assessments for drainage under the acts of March 18, 1858, and the act supplementary thereto of March 17, 1859," a tableau or assessment roll of the amount to be paid for draining the property within the First Draining District, within the parish of Orleans from the second to the tenth annual instalment, inclusive, has been prepared and notice thereof duly given; that your petitioners herewith present a copy of said assessment roll to be filed herewith in this court; that in said assessment roll the property assessed is set forth and described, together with the amounts assessed and the names of the owners thereof, as far as known, and in case the owner or owners are unknown, said fact is stated; all of which, together with other necessary particulars, will more fully appear by reference to said copy herewith exhibited and filed and contained in a folio volume marked "B," consisting of three subdivisions, the first entitled "Book No. 1 B," the second, "Book No. 2 B," the third, "Book No. 3 B," together with a recapitulation.

That said assessments have been open for the inspection of the persons whose property was assessed for many months, and said persons were notified duly by public advertisement, but they have neglected to pay the amount due by them respectively to the common fund of all, as set forth in said assessment roll.

That your petitioners, herein appearing in the capacity aforesaid, have been, by act of the General Assembly of the State, entitled "An Act to provide for the drainage of New Orleans" numbered 30 of the acts of the session of 1871 "subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of draining and leveeing within the

limits of the city of New Orleans and Carrollton" and authorized and directed to collect the balance due on the assessments as shown by the books of the first, second and third draining districts, under the acts of March 18, 1868, March 17, 1859, and the several supplementary and amendatory acts thereto; and directed to execute and enforce the said assessments according to existing laws which said assessments are by said act of 1871 declared to be confirmed and made exigible.

Your petitioners therefore pray that it may please the court to order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order be published in the English and French languages in the official journal twice each week for thirty days; and that after due proceedings had, judgment be rendered approving and homologating said assessment roll, to operate as a judgment against the property assessed and the owners thereof respectively—that is to say, a judgment against each property described in said assessment roll for the amount assessed against it and remaining unpaid and against the owner or owners of each property set forth in said roll for the amount assessed against his or their property respectively, for the purpose of defraying the expenses of the draining and leveeing the said first district as contemplated by law and by the acts of the Legislature aforesaid, with ten per centum in addition to the amount assessed to pay costs and counsel fees, and six per centum per annum interest on each amount assessed from the date of the assessment in accordance with law.

And your petitioners pray for all general and equitable relief. And as in duty bound, etc., etc.

(Signed) RUFUS WAPLES,
Attorney for Petitioners.

Endorsed—"Seventh District Court, parish of Orleans. No. 9189. In the matter of the Commissioners of the First Draining District praying for a decree, etc., etc. Petition of the city and administrators of New Orleans for the homologation of the assessment roll for said district, for the annual instalments from the second to the tenth inclusive. Filed Dec. 7th, 1871. H. J. Dussor, Dy. Clk."

Judgment.

Judgment entered 15th April, 1872.

For the reasons this day assigned in writing and filed herein, it is ordered and decreed that the motion to homologate the tableau and assessment filed herein on the 7th December, 1871, be refused; that said tableau and assessment be vacated and rejected and that plaintiff have leave and the right be reserved to said plaintiff to present a new tableau and assessment according to law, and to demand the reimbursement of the actual and lawful costs of establishing the draining district from time to time as the work shall have actually progressed. It is further ordered that the city of New Orleans be condemned to pay the costs of these proceedings to date.

Judgment signed 19th April, 1872.

(Signed) T. WHARTON COLLINS,
Judge.

A true copy.

DON GORDON,
Dy. Clerk.

Motion.

Seventh District Court, Parish of Orleans.

In the matter of the Board of Commissioners of the First Draining District, praying, etc.

On motion of Rufus Waples, attorney for the city of New Orleans, the petitioner for the homologation of the assessment roll herein filed and on suggesting that said petitioner feels aggrieved by the final judgment rendered herein on the 15th and signed on the 19th inst. against the prayer of your petitioner; and that there is error in said judgment to the prejudice of said city, and those by it represented; and on further suggesting that said city is desirous of appealing from said judgment and to suspend its operation pending said appeal; it is ordered

That a suspensive appeal be granted to the city of New Orleans returnable to the Supreme Court on the third Monday of May next—the time being insufficient to prepare the record for the first Monday of May—the city of

New Orleans being exempt by law from giving bond and security upon appeals.

Endorsed—"9189. 7th Dist. Court. In the matter of the Commissioners of First Draining Dist. praying etc. Motion of appeal. Filed 19th April '72—Gasp. Janin, Dy. Clk."

A true copy.

DON GORDON,
Dy. Clerk.

No. 9189. Seventh District Court, parish of Orleans, transferred to No. 25,395, Third District, parish of Orleans, and from that court transferred to the Superior District Court, parish of Orleans, and from the last named court transferred to No. 5758 Civil District Court, parish of Orleans.

Judgment Homologating Assessment Roll.

DECREE OF SUPREME COURT.

SUPERIOR DISTRICT COURT, PARISH OF ORLEANS.

Extract from the minutes of Saturday, March 21st, 1874:

Present, the Hon. Jacob Hawkins, Judge.

No. 25,935, SUPERIOR DISTRICT COURT.

IN THE MATTER OF THE COMMISSIONERS OF THE FIRST DRAINING DISTRICT, PRAYING FOR HOMOLOGATION OF TABLEAU, ETC.

In this case an appeal having been taken to the Supreme Court of La. the decree of said court was this day filed and ordered to be recorded, and is as follows:

It is therefore ordered that the judgment appealed from be reversed and that the oppositions herein be dismissed at the costs of the opponents respectively.

And it is further ordered that the assessment roll herein, except that portion designated in Book 2 B on said roll, be and is hereby approved and homologated and this approval and homologation shall operate as a judgment against the property described as assessed in said roll

and also against the owner or owners thereof with 10 per cent. in addition to the amount assessed to pay costs and counsel fees.

The case having been reopened on rehearing for certain restricted purposes the following amendatory decree was rendered on the 9th of February, 1874:

It is therefore ordered that the rehearing asked for by the estate of Davidson be refused, and it is further ordered that our decree be amended by striking therefrom the phrase, "Except the portion designated in Book No. B," that the said portion of the assessment roll be embraced in this judgment of homologation and that as thus amended the said decree remain undisturbed.

I, Don Gordon, deputy clerk of the Civil District Court of the parish of Orleans, do hereby certify that the foregoing pages, to-wit: one, two, three and four, are true copies of the original on file in the clerk's office, Civil District Court, parish of Orleans; that pages 5, 6 and 7 are true and correct copies of a certified copy of the original to be found in the record No. 7063 of the Supreme Court of Louisiana, the original being missing from said office; that pages 8, 9, 10, 11, 12 and 13 are true and correct copies of the originals on file in clerk's office; that pages 14 and 15 are true and correct copies of a certified copy of the original to be found in record No. 7063 of the Supreme Court of Louisiana, the original being missing from said office, and that no answers or oppositions were filed to any of the above proceedings by the city of New Orleans as appears from the several dockets of the several late courts in which said proceedings were had, and I do further certify that said foregoing judgments are final and executory and that the copy of assessment rolls referred to in said foregoing judgments homologating said assessment rolls can not be found in said clerk's office, and in lieu thereof I annex hereto a duly certified copy of extract for said original assessment roll duly certified to by W. T. Mayo, bookkeeper, City Hall, and dated December 13, 1886, and marked O. K. 1 and O. K. 2.

(Seal) (Signed) DON GORDON,
Dy. Clerk, Civil District Court, Parish of Orleans.

Receipt of Recorder of Mortgages Referred to in Foregoing Petition.

Filed August 24, 1861, in foregoing pages 1 and 2.
(Stamp)

Original.

Received from the Draining Commissioners of the First Draining District a plan and tableaux of the First Draining Section of this city comprised within the limits commencing at the Mississippi river and Julia street, following Julia street to the canal of the Canal and Banking Company, along said canal to Lake Pontchartrain, along said lake to the Bayou St. John, along said bayou to Canal Carondelet, along said canal to St. Peter street, along said street to the river along the river bank to the place of beginning, which plan and eight volumes of tableaux are hereby deposited in accordance with the seventh section of the act of the Legislature of Louisiana, approved March 18, 1858, and amendments thereto approved March 17, 1859.

(Signed) EMILE LASERE, Rec.

New Orleans, May 4, 1861.

Endorsed—Receipt for Tableaux and Plan of 1st Draining District, New Orleans, deposited in Mortgage Office May 4, 1861. 15,846. Filed Aug. 24, 1861. A. Dens, Dy. Clerk.

(The above is now No. 5758 Civil Dist. Court), a true copy of the original under the above No. Civil District Court.

DON GORDON,
Dy. Clerk C. D. Court.

Proof Publication Referred to in Foregoing Judgment of Aug. 24, 1861.

In foregoing pages 3 and 4.

State of Louisiana, Third District Court of New Orleans.
No. 15,846 Now No. 5758 C. D. Court.

In the matter of the Board of Commissioners of the First Draining District.

A. Denis being duly sworn says; that the notices of the

Board of Commissioners of the First Draining District that they will proceed to drain that portion of the city of New Orleans comprised in the limits of said First Draining District have been published in the French and English languages as follows, to-wit: in the New Orleans *Commercial Bulletin* on the 9th, 13th, 20th and 27th May, 1861, and in the New Orleans *Bee* on the 6, 13, 20 and 27 May, 1861.

(Signed) A. DENIS.

Sworn to and subscribed before me Aug. 24, 1861.

(Signed) OSCAR LE BLANC,
Dy. Clerk.

No opposition filed. A. D.

Endorsed—15,846, 3rd Dist. Court. In the matter of the Board of Commissioners of the First Draining District —proof of publication filed Augt. 24, 1861. A. Denis, Dy. Clk.

A true copy:

DON GORDON,
Dy. Clerk, C. D. C.

Order on foregoing petition filed Feby. 5th, 1863, pages 5 and 6 of the foregoing pages. No. 17,028 of the docket, 3rd District Court.

Order Annexed to Petition.

Upon filing the assessment roll of the First Draining District and on the petition of the commissioners of said district it is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order why said assessment roll should not be approved and homologated, and it is further ordered

That said order be published in the English and French languages in the *Daily Delta* and the New Orleans *Bee* newspapers twice each week for thirty days.

New Orleans, Feb'y 5th, 1863.

(Signed) E. HIESTAND, Judge.

Publication.

State of Louisiana, Third District Court for the parish of Orleans, No. 17,028.. In the matter of the Commissioners of the First Draining District praying for the homologation of assessment roll, etc., etc.

Notice.

Extract from the *Daily Delta* published February 7, 1863.

State of Louisiana, Third District Court for the Parish of Orleans, No. 17,028.

Notice is hereby given to all persons whom it may concern to show cause, if any they have, within thirty days from the publication of this order why the assessment roll of the Commissioners of the First Draining District filed in this case should not be approved and homologated according to law.

(Signed) C. F. BERENS, Clk.

New Orleans, Feb'y 5, 1863.

State of Louisiana, Third District Court for the Parish of Orleans, No. 17,028.

In the matter of the Commissioners ot the First Draining District praying for the homologation of the assessment roll, etc., etc..

Notice published in the *Daily Delta*, Feb. 7th, 1863.

Notice is hereby given to all persons whom it may concern to show cause if any they have within thirty days from the publication of this order why the assessment roll of the Commissioners of the First Draining District filed in this case should not be approved and homologated according to law.

(Signed) C. F. BEHRENS, Clerk.

New Orleans, 5th February, 1863.

Feb. 7 2 ta w 30d.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the Commissioners of the First Draining District praying for the homologation of assessment roll, etc., etc.

Notice.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

Notice is hereby given to all persons whom it may concern to show cause if any they have within thirty days from the first publication of this order why the assessment roll of the Commissioners of the First Draining District filed in this cause should not be approved and homologated according to law.

(Signed) C. F. BERENS, Clerk.

New Orleans, Feb. 5th, 1863.

Feb. 7, 30d 2 t w.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the Commissioners of the First Draining District praying for the homologation of the assessment roll, etc., etc.

Notice.

Published in the New Orleans *Bee*, February 7, 1863.

Notice is hereby given to all persons whom it may concern to show cause if any they have within thirty days from the first publication of this order, why the assessment roll of the Commissioners ot the First Draining District should not be approved and homologated according to law.

New Orleans, February 5, 1863.

(Signed) C. F. BERENS, Clerk.

Feb. 7. 30d. 2 a w.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the Commissioners of the First Drain-

ing District praying for the homologation of assessment rolls, etc., etc.

Notice—In French.

Extract from the New Orleans *Bee* (*L'Abeille de la Nouvelle Orleans*) published February 7, 1863.

Etat de la Louisiane, Troisieme Cour de District, pariosse d'Orleans. No. 17,028.

Avis est donné a tous ceaux que cela pent concerner de farre connaitre, dans les trente pours que suivront la premére publication de cet ordre, les raisons pour lesquelles la tableau d'assessment des commissaires au premiere district de assessehement enregistre dans cette affaire ne suait pas approuve et homologue conformement a la loi.

(Signe) C. F. BERENS, Greffier.

v feu 1 m 2 fo 5.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the commissioners of the First Draining District praying for the homologation of the assessment roll, etc., etc.

Notice in French

published in the New Orleans *Bee* (*L'Abeille de la Nouvelle Orleans*), Feby. 7, 1863.

Etat de la Louisiana, Troisseme Cour de Destrict, Paroisse d'Orleans. No. 17,028.

Avis est donné a tous ceux que cela pent concernes de faire connaitre dans les trente jours qui suivront la premiére publication de cet ordre, les raisons pour lesquelles la tablau d'assessment des commissaires au premier destrict de dessechement enregistre dans cette affaire ne Suait pas approuve et homologne conformement a la loi.

(Signe) C. F. BERENS, Greffier.

7 feb 1 m 2 p s

Proof of Publication.

State of Louisiana, Third District Court for the Parish of Orleans. No. 17,028.

In the matter of the Commissioners of the First Draining District, etc.

Proof of Publication, Filed March 11, 1863.

Mr. G. Ingram being duly sworn in open court, says: The notices to all persons interested in the matter of the Commissioners of the First Draining District praying for the homologation of assessment roll, etc., were published in the New Orleans *Bee* on the 7th February, and for thirty days thereafter in French and English, and also in the *Daily Delta* for thirty days in French and English in said newspaper, both of which are published in the city of New Orleans.

Extract from Minutes Seventh District Court of December 5, 1871.

Motion and Order to File Record,

Filed December 5, 1871.

State of Louisiana, Seventh District Court for the Parish of Orleans. No. 9189.

In the matter of the Commissioners of the First Draining District, praying, etc.

Motion and Order to File Record.

On motion of Rufus Waples, attorney for the city of New Orleans and of the administrators thereof as collectors of the assessments in the First Drainage District, and on suggesting that he herewith presents the Record 16,269 of the late Third District Court of New Orleans, and on further suggesting that it contains the proceedings on which the judgment decreeing mortgage and privilege on the property to be drained in said district, and therefore properly forms the basis of the proceedings heretofore had in the above entitled case it is ordered

That the record herewith presented transferred from the Third District Court be filed in this court in the case No. 9189. (Order granted on petition filed Dec. 7th, 1871, pages 9, 10 and 11 of foregoing pages.)

Order.

Upon the filing of the assessment rolls showing the amounts due by the persons and property assessed in the First Draining District within the parish of Orleans from the second to the tenth annual instalment inclusive, the city and administrators of New Orleans charged with the collection of said amounts and the management of affairs of said district, it is ordered that all persons whom it may concern do show cause if any they have within thirty days from the first publication of this order why said assessment roll should not be approved and homologated.

And it is further ordered that said order be published in the English and French languages in the official journal the New Orleans *Republican* newspaper twice each week for thirty days.

New Orleans, December 7, 1871.

(Signed) T. WHARTON COLLINS, Judge.

Proof of Publication.

Filed January 15, 1872.

Seventh District Court, No. 9189.

In the matter of the commissioners of the First Draining District praying, etc.

Proof of Publication.

Filed 15th January, 1872.

(Signed) E. JAMES, Dy. Clk.

The undersigned appointed by the Hon. Court expert, and duly sworn in open court to examine the publications of the notices calling on all parties concerned to show cause within thirty days why the assessment roll herein filed should not be approved and homologated,

Reports that the notices were published in the English and French languages as required by the orders of this

court herein made the 7th December, 1871, in the newspaper called the New Orleans *Republican* on the 10th, 14th, 20th, 23d, 27th, 29th December, 1871, and on the 2nd, 5th, 10th and 11th January, 1872, and twice a week.

Respectfully submitted.

(Signed) E. JAMES,
Dy. Clk. 7th District Court.

New Orleans, January 15, 1872.

Proof of Publication.

State of Louisiana, Seventh District Court for the Parish of Orleans. No. 9189.

In the matter of the Commissioners of the First Draining District, praying for a decree, etc., etc.

Petition of the city and administrators of New Orleans praying for the homologation of the assessment roll for said district.

Notice

Published in New Orleans *Republican* newspaper of the following dates: Dec. 10, 14, 20, 23, 27 and 29, 1871, and Jan'y 2, 5, 8, 10, 11, 1872, to show cause why assessment roll herein should not be approved and homologated.

Order.

Upon the filing of the assessment roll showing the amounts due by the persons and property assessed in the First Draining District within the parish of Orleans from the first to the tenth annual instalment inclusive and upon the petition of the city and administrators of New Orleans charged with the collection of said amounts and the management of the affairs of said district.

It is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order, why said assessment roll should not be approved and homologated, and it is further ordered that said order be published in the English and French languages in the official journal, the New Orleans *Republican* newspaper twice each week for thirty days.

New Orleans, December 7, 1871.

(Signed) T. W. COLLINS, Judge.

A true copy.

(Signed) A. D. BERNOUDY, Clerk.

Etat de la Louisiane, Septienne Cour de District pour la Paroisse d'Orleans. No. 9189.

Dans l'affaire des Commissaires du premier destrict de Dessechement de mandant un decret, etc. Petition de la ville et des administrateurs de la Nouvelle Orléans demandant l'homologation du role d'assessment du dit destrict.

Ordre.

Sur l'enliassement du role d'assessement deur ontrant les moulants dues par les personnes et les propriétés assessees dans le Premier District la Dessechement de la Paroisse d'Orleans charges de la collection des dits moutants et de la direction des affaires du dit district il est ordonne que toules les personnes interessees donnent leurs raisons si elles en ont dans les trente jours sevivant la premierie publicion de cet ordre pour lesquelles le fit role d'assessement ne servait pas approuve et homoloque.

Et il est en plus ordonne que le dit ordre soit public en anglais et en francais dans le journal official le Republicanne de la Nouvelle Orleans deux fois pas semaine pendant trente jours Nouvelle Orléans.

(Signé) T. WHARTON COLLINS, Judge.

Pour copie conforme.

(Signé) A. D. BERNOUDY, Greffier.

State of Louisiana, Clerk's Office Civil District Court, Parish of Orleans.

I, Don Gordon, deputy clerk of the Civil District Court, parish of Orleans, do hereby certify that the foregoing pages 17 and 18 contain true and correct copies of the original on file in the clerk's office of said Civil District Court, and that pages 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 contain a true and correct copy of a duly certified copy thereof to be found in record No. 7063 of the Supreme Court of the State of Louisiana in suit entitled New Orleans Canal and Banking Company vs. The City of New Orleans on appeal from the late Sixth District Court, parish of Orleans, wherein said originals were offered and filed and that the originals can not be found among the

records of the late courts transferred to the Civil District Court of the parish of Orleans nor in said clerk's office of said Civil District Court.

(Seal) (Signed) DON GORDON,
Dy. Clerk Civil Dist. Court.

No. 17,028.

Asssessment Roll of the First Draining District.

Filed February 5, 1863. (Signed) C. F. Berens.
Rendered March 11, 1883. Signed March 17, 1863.
(Signed) E. Hiestand, Judge.

In the 3d District Court, New Orleans, La.

Extracts from the Original Assessment Roll

of the First Drainage District on file in the Comptroller's office, city of New Orleans, of which copy was filed in the Third District Court, parish of Orleans, on the 5th day of February, 1863, in suit No. 17,028 of said court, and homologated by judgment of that court rendered on the 11th and signed on the 17th March, 1863:

CITY OF NEW ORLEANS.

Remarks.	Square.	Lot.	Area.	Amount.
City of New Orleans	9	3	296	09
do.	"	4	1186	39
Engine House No. 7	68	18	4105	1 35
" " Basin st	123	11	2775	91
Bienville School	185	5	8310	2 74
Levee Ground	1C	Sqr.	23213	7 66
do.	2C	"	28422	9 38
do.	3C	"	44568	14 17
do.	4C	"	43645	14 40
do.	5C	"	28574	9 43
do.	6C	"	26815	8 84
do.	1B	"	26127	8 62
do.	2B	"	34325	11 32
do.	3B	"	44479	14 67
do.	4B	"	43654	14 40
do.	5B	"	28584	9 43
do.	6B	"	26787	8 84
Lafayette Square	176	"	120713	39 83
Public School	180	11	15035	4 96
Recorder's Court	219	11	6732	2 22
Washington Artillery	"	29	2528	83

Remarks.		Square.	Lot.	Area.	Amount.
Engine House No. 5 (Girod st.)		"	30	3504	1 16
do.		"	31	2643	87
do.	No. 13 (Perdido	221	14	2660	88
do.	(La. Hose Carriage)	"	18	2817	93
Poydras Market		260	Sqr.	13209	4 35
do.		272	"	11742	3 87
Fisk School		332	18	3125	1 03
do.		"	19	3125	1 03
do.		"	20	3125	1 03
do.		"	21	3125	1 03
do.		"	22	3125	1 03
City of N. Orleans		261	12	1378	45
Engine House No. 14		339	11	3306	1 09
City Hall		220	2.3.4	22302	7 36
City of New Orleans		470	6	2975	98
do.		"	7	2975	98
do.		"	8	2975	98
do.		"	9	2975	98
do.		"	10	2975	98
do.		"	11	2975	98
City Park (55 squares)	Various Nos.	Sqrs	7.36	9500	2431 94
Oak House		345	Sqr.		
House of Refuge		361½	"	"	
Protestant		377	"	267,192	88 17
Cemetery		396	"		
					$2736 58

CITY OF NEW ORLEANS.

The streets running from the river to Claiborne str. are calculated the whole length. The streets running at intersections are calculated the whole length less the intersections of other streets.

Remarks.	Name of Streets.	Area.	Amount.
	North half of Julia street to Rampart	132441	
	Florida Walk from Rampart to Claiborne	314550	
	Notre Dame	66130	
	Girod from Levee to Liberty	234916	
	Lafayette from Levee to Claiborne	321695	
	South street, south of Lafayette sqr	15732	
	North " north " " "	15723	
	Poydras street from Levee to Claiborne	565683	
	Natchez street	10955	
	Commercial Alley	8184	
	Perdido street from Levee to Claiborne	161580	
	Union "	36522	
	Gravier " from Levee to Claiborne	242308	
	Common " " " " "	373684	
	Gasquet " " Basin " "	83634	
	Canal " " Levee " "	902964	
	Customhouse street from Front to Claiborne	213213	
	Bienville " " Clay " "	197981	
	Conti street from New Levee " "	185935	
	St. Louis street from " " "	183589	
	Toulouse " " " Villere	120502	
	Jefferson "	12308	
	South half of St. Peter street	45450	
5	Carondelet Walk from Basin to Claiborne	97955	
	Cypress street " Liberty " "	95490	
	Perrilat " " " " "	58960	
	Square feet carried over	4700624	

Remarks.	Names of Streets.	Area.	Amount.
The streets running from the river to Claiborne streets are calculated the whole length. The streets running at intersections are calculated the whole length less the intersections of other streets.	Amount brot. over	4700684	
	Willow or St. Adeline street Florida to Claiborne, crossed streets not included	47736	
	Clara or Magnolia street	88872	
	Magnolia street	117799	
	Locust "	106526	
	Freret "	69028	
	Howard "	90590	
	Liberty "	111872	
	Franklin "	225259	
	Basin "	463730	
	Rampart or Circus street	411289	
	Dryades street	121410	
	Penn "	12852	
	Baronne "	169179	
	Carroll "	13020	
	Carondelet street	158697	
	St. Charles "	157312	
	St. Mary and St. Francis street	32718	
	Camp street	144270	
	Bank Place	8175	
	Magazine street	129465	
	Foucher "	24570	
	Tchoupitoulas street Julia to Canal	118080	
	Commerce street	50310	
	New Levee	123816	
Streets from the river to Claiborne street. Crossing streets are not included.	Fulton street	111104	
	Front "	106702	
	Delta "	103354	
	Crossman street	17940	
	Robertson " crossing not included	121264	
	Vil ere " " " "	118402	
	Marais " " " "	118405	
	Treme " " " "	116812	
	Burgundy " " " "	72722	
	Dauphine " " " "	73074	
	Bourbon " " " "	73112	
	Royal " " " "	73150	
	Exchange Alley " " "	30700	
	Chartres street " " "	73264	
	Dorcier " " " "	12480	
	Old Levee " " " "	96390	
	Clinton " " " "	9580	
	Peters " " " "	74860	
	Battare of Levee bet. Canal and St. Peter	420800	
	Superficial feet	9521574	$3,142.11 1/2

Remark.	Streets North of Metairie Road to the Lake.	Area.	Amount.
	Catina street	632166	
	Harney "	302450	
	Milne "	977874	
	Customhouse street	814200	
	Louisville "	814920	
	Bienville street (Canal not included)	1613322	
	Vicksburg street	816420	
	Conti "	817082	
	Memphis "	817563	
	St. Louis avenue	1662984	
	Toulouse street	709562	
	Anthony "	710342	
	St. Peter "	711181	
	Orleans avenue (Canal not included)	2581129	
	St. Ann street	709201	
	Murat "	709924	
	Dumain avenue	1421284	
	Napoleon street	711302	
	St. Philip "	711966	
	Solomon "	712612	
	Ursulines avenue (Canal not included)	1626883	
	Hospital street	823261	
	Barracks street	823922	
	Esplanade "	746403	
	Fort "	302880	
	First "	52232	
	Second street	41557	
	Third "	39012	
	Fourth "	36726	
	Fifth "	34136	
	Sixth "	32648	
	Seventh "	30111	
	Eighth "	26769	
	Ninth "	18332	
	Tenth "	18057	
	Eleventh "	15089	
	Twelfth "	12121	
	Thirteenth "	9153	
	Fourteenth "	6185	
	Fifteenth "	3217	
	Cross streets.		
	Fisk street	106431	
	Genois "	145348	
	Passage "	23320	
	Mexico "	92980	
	May "	328052	
	Cass "	218522	
	Houston "	393980	
	Adams avenue	793592	
	Delophon street	402843	
	Brown "	402868	
	Butler "	405900	
		27067215	

The streets running from Metairie Road to the Lake are calculated the whole length. The streets running crosswise are calculated the whole length less the intersection of other streets.

Remark. Streets North Metairie Road to Lake.	Area.	Amount.
Amt. brot. forward	27067215	
North street	407823	
Fillmore avenue (Canal not included)	578820	
Conrad street	401160	
Walker "	397920	
Mouton "	403380	
Downs "	401520	
Jackson avenue	783488	
Ridgely street	409680	
Twiggs "	413402	
Smith "	411420	
Lane "	407022	
Harrison avenue (Canal not included)	1429814	
Bragg street	413220	
Fremont "	415800	
French "	418500	
Ringold "	423420	
Polk avenue	855120	
Gaines street	431102	
Harney "	422220	
Brooks "	419700	
Scotts "	419352	
Taylor avenue (Canal not included)	581190	
Mason street	410460	
Crittenden street	402012	
Corwin "	401520	
	39526280	
Amt. brot. forward	39526280	
Clement street	394746	
Monroe avenue	898520	
Webster street	180120	
Dickinson "	172260	
Clay "	169920	
Calhoun "	164700	
North Half of Metairie Road (New)	325850	
Sassafras street	40152	
Plane "	39348	
Plaquemine "	38508	
Like Oak "	37702	
Ash "	36902	
Poplar "	36104	
Laurel "	35250	
Hickory "	34454	
Dublin avenue	85760	
Chestnut street	32650	
Lilac "	31850	
Magnolia "	31008	
Cypress "	30202	
Cotton "	29409	
Pine "	28601	
London avenue	120312	
Cherry street	29102	
Walnut "	28256	
Raspberry "	27450	
	42591416	

The streets running from the Metairie road to the lake are calculated the whole length. The streets running crosswise are calculated the whole length less the intersections of other streets.

Remark.	Streets North of Metairie Road to the Lake.	Area.	Amount.
	Amt brot. over	42591416	
	Esplanade avenue	60170	
	Mulberry street	19251	
	Plum "	25803	
	Cedar "	25002	
	Paris avenue	61823	
	Cock Pit street	23301	
	Robin "	22703	
	Dove "	22153	
	Swan "	21802	
	Wood Cock avenue	28803	
	Pigeon street	17300	
	Lark "	21052	
	Goose "	20500	
	Duck "	19902	
	Rail "	19253	
	Snipe "	18652	
	Plover "	16604	
	Turkey avenue	15606	
	Quail street	3300	
	Cross "	18497	
	Comfort street	35086	
	Bridge "	34821	
	Virginia "	30528	
	Helena "	22525	
	Canal "	165240	
		43361093	
	Amt. brot. forward	43361093	
	Gasquet street	3975	
	North half of old Metairie road	58781	
		43423849	
	Sqr. feet amt. brot. forward	9521574	
		52945423	

The streets running from the Metairie road to the Lake are calculated the whole length. The streets running crosswise are calculated the whole length, less the intersection of other streets.

(Signed) G. INGRAM,
Board of Commissioners, First Draining District.

I do hereby certify that the foregoing is a true and correct extract from the original assessment rolls on file in the office of the Bureau of Drainage in the Comptroller's Office of the city of New Orleans.

New Orleans, City Hall, Dec. 13, 1886.

WM. T. MAYO, Book Keeper.

Endorsed—"O K 1" Don Gordon, Dy. Clerk, Civil District Court.

Extract from the Original Assessment Roll of the First Draining District of Parish of Orleans on file in the Comptroller's Office in the City of New Orleans, which Copy was filed in the Seventh District Court, Parish of Orleans, and Homologated by Judgment of the Superior District Court of the Parish of Orleans on the 21st day of March, 1874.

No. of Mill.	Names of Owners of Lands.	Dist.	No. of Sq.	No. of Lot.	Name of Street.	Superfic'l Ft.	Rate.	Amount of Assessm't.
99	City of New Orleans	2nd	9	3	Old Levee Alley	296	3 1/10 Mills	95
552	" " Engine No. 7	"	68	18	Dauphine	4105	" "	13 55
1074	" "	"	123	4	Conti	2775	" "	9 15
1583	" " School House	"	185	5	Bienville	8310	" "	27 40
2357	" "	1st	1 C	sq.	Walter, Delta, Common and Gravier	23213	" "	76 70
8	" "	"	2 C	"	" " Poydras " "	28422	" "	93 80
4223	" " Lafayette Square	"	176	"	South, North, St. Charles and Camp	120713	" "	398 35
4271	" " School House	"	180	4	St. Charles	15049	" "	49 65
4342	" " Engine No. 5	"	219	31	Girod	2643	" "	8 70
4	" " City Hall	"	220	2	Lafayette	6232	" "	20 55
5	" " "	"	"	3	"	5218	" "	17 20
6	" " "	"	"	4	St. Charles	10852	" "	35 80
4385	" " Engine No. 13	"	221	14	Perdido	2666	" "	8 80
9	" " Louisiana Hose Co	"	"	18	Carondelet	2822	" "	9 30
4705	" " Poydras Market	"	260	sq.	N. and S. Poydras, Penn and Dryades	13209	" "	43 60
9930	" " " "	"	271	"	" " " Rampart "	11742	" "	38 75
5182	Saml. J. Peters, Jr., to City of N. O., Pilie Market	"	296	"	" " " " Basin	8197	" "	16 25
5581	City of New Orleans, Fisk School	"	332	18	Franklin	3216	" "	10 60
2	Fisk School	"	"	19	"	3216	" "	10 60
3	" "	"	"	20	"	3216	" "	10 60
4	" "	"	"	21	"	3216	" "	10 60
5	" "	"	"	22	"	3216	" "	10 60
5740	Engine No. 14	"	339	11	Common	3306	" "	183 05
582	Work House	"	377	sq.	Magnolia	55467	" "	198 80
4	House of Refuge	"	396	sq.	Perrilat	60245	" "	9 80
6845	Madison School	"	470	6	Palmyra	2975	" "	9 80
6	" "	"	"	7	"	2975	" "	9 80
7	" "	"	"	8	"	2975	" "	9 80
8	" "	"	"	9	"	2975	" "	9 80
9	" "	"	"	10	"	2975	" "	9 80
6850	" "	"	"	11	"	2975	" "	9 80
						419412		1372 95

No. of Bill.	Names of Owners of Lands.	Dist.	No. of Sq.	No. of Lot.	Name of Street.	Superfic'l Ft.		Rate.	Amount of Assessm't.
8639	New Orleans City, C. City Park	2nd	658	—	Metarie Road, St. Louis, Calhoun, Toulouse	83243		" "	274 70
8640	" " " " "	"	659	—	" Anthony " "	110750		" "	365 47
1	" " " " "	"	660	—	" " " St. Peter	111153		" "	366 80
2	" " " " "	"	661	—	" Orleans " "	70207		" "	231 68
3	" " " " "	"	682	—	Clay " " "	70207		" "	231 68
4	" " " " "	"	683	—	" Anthony " "	111153		" "	366 80
5	" " " " "	"	684	—	" " " Toulo'se	110750		" "	365 47
6	" " " " "	"	685	—	" St. Louis " "	83243		" "	274 70
8664	" " " " "	"	703	—	" " Dickson "	83243		" "	274 70
					Amount over	833949			2752 00
					Amount brought forward—	833940			$2752 00
8665	New Orleans City, C. City Park	2nd	704	—	Clay, Toulouse, Dickinson, Anthony,	110750	3 1/2	Mills.	365 47
6	" " " " "	"	705	—	" St. Peter, " "	111153		" "	366 80
7	" " " " "	"	706	—	" " " Orleans	70207		" "	231 68
8	" " " " "	"	727	—	Webster, " " "	70207		" "	231 68
9	" " " " "	"	728	—	" " " Anthony	111153		" "	366 80
8670	" " " " "	"	729	—	" Toulouse, "	110750		" "	365 47
1	" " " " "	"	730	—	" " " St. Louis	83243		" "	274 70
8692	" " " " "	"	751	—	" " Monroe	83243		" "	274 70
3	" " " " "	"	752	—	" " " Anthony	110750		" "	365 47
4	" " " " "	"	753	—	" " "	111153		" "	366 80
5	" " " " "	"	754	—	" Orleans	70207		" "	231 68
8941	" " " " "	"	662	—	Metairie Road, St. Anne, Calhoun, Orleans	102179		" "	337 19
2	" " " " "	"	663	—	" " " " Murat	100305		" "	331 00
3	" " " " "	"	664	—	" " Dumaine, " "	84899		" "	280 16
4	" " " " "	"	665	—	" " " " Napoleon	88753		" "	292 88
5	" " " " "	"	666	—	" " St. Philip, " "	88753		" "	292 88
6	" " " " "	"	667	—	" " " " Solomon	88753		" "	292 88
7	" " " " "	"	668	—	" " Urselines " "	88750		" "	292 87
8958	" " " " "	"	675	—	Clay, Urselines, Calhoun "	88750		" "	292 87
9	" " " " "	"	676	—	" St. Philip, "	88753		" "	292 88
8960	" " " " "	"	677	—	" " " Napoleon	88753		" "	292 88
1	" " " " "	"	678	—	" Dumaine, " "	88753		" "	292 88
2	" " " " "	"	679	—	" " " Murat	84899		" "	280 16
3	" " " " "	"	680	—	" St. Anne " "	102305		" "	331 00
4	" " " " "	"	681	—	" " " Orleans	102179		" "	337 19
5	" " " " "	"	707	—	" " Dickinson, "	102179		" "	337 19
6	" " " " "	"	708	—	" " " Murat	100305		" "	331 00
7	" " " " "	"	709	—	" " " "	84899		" "	280 16

No.	Names of Owners of Land.	Dist.	Sq.	Lot.	Names of Streets.	Superfic'l Ft.	Rate.	Amount.
8	New Orleans City, C. City Park	2nd	710	—	" Dumaine, Dickinson, Napoleon	88753	" "	292 88
9	" " " "	"	711	—	" St. Philip, " "	88753	" "	292 88
8970	" " " "	"	712	—	" Solomon	88753	" "	292 88
1	" " " "	"	713	—	" Urselines, Dickinson, Solomon	88750	" "	292 87
8980	" " " "	"	720	—	Webster, " Solomon	88750	" "	292 87
1	" " " "	"	721	—	" St. Philip, "	88753	" "	292 88
2	" " " "	"	722	—	" " Napoleon	88753	" "	292 88
3	" " " "	"	723	—	" Dumaine, "	88753	" "	292 88
4	" " " "	"	724	—	" " Murat	84899	" "	280 16
5	" " " "	"	725	—	" St. Anne, "	100305	" "	331 00
6	" " " "	"	726	—	" " Orleans	102179	" "	337 19
7	" " " "	"	755	—	" Orleans, Murero, St. Anne	102179	" "	337 19
					Amount over	4548512		14914 88
					Amount brought forward—	4548512		14914 88
8988	New Orleans City, C. City Park	2nd	756	—	Webster, St. Anne, Monroe, Murat	100305	3⅓ Mills	331 00
9	" " " "	"	757	—	" Dumaine, " "	84899	" "	280 16
8990	" " " "	"	758	—	" " " Napoleon	88753	" "	292 88
1	" " " "	"	759	—	" St. Philip, " "	88753	" "	292 88
2	" " " "	"	760	—	" " " Solomon	88753	" "	292 88
3	" " " "	"	761	—	" Urselines, " "	88750	" "	292 87
9770A	N. O. City, Streets, St. Peter and Carondelet Walk to Julia and river to Claiborne street					95215574	5088725	16697 55
9770C	N. O. City, Streets, Carondelet Walk to Florida landing, Metairie Ridge to the Lake					52945423	624669997	205041 10

RECAPITULATION.

City, all streets from river to Claiborne street, and Metairie road to the Lake	62466997	205041 10
City property, schools, markets, engine houses, etc., with river to Claiborne street	419412	1372 95
" " the City Park, 55 squares fronting Metairie road	5088725	16697 55
Superficial feet	67975134	223111 60

I do hereby certify that the foregoing is a true and correct extract from the original assessment rolls on file in the office of the Bureau of Drainage in the comptrollers office of the city of New Orleans.

(Signed) WM. T. MAYO,

Book-keeper.

CITY HALL, December 13, 1886.

Exhibit "B."

Proceedings in the matter of the Commissioners of the Second Draining District, praying a decree of mortgage privilege, etc., rendered by the Third Judicial District Court of Jefferson, in suit No. 1938, of the docket, rendered and signed April 29, 1861.

Filed with and made part of bill, November 26, 1894.

(Written in red ink: Exhibit "B." from pages 1 to 5 inclusive, and the first eleven lines on page 6, with clerk's certificate on page 12.)

To the Hon. Victor Burthe, Judge of the Third Judicial District Court of Louisiana, in and for the parish of Jefferson:

The petition of the Board of Commissioners of the Second Draining District, through them President L. H. Place,

Respectfully represents; that agreeably to the provisions of an act entitled "An Act to provide for leveeing and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, your petitioners have had three plans drawn by A. S. Phelps, engineer of said draining district of a certain section of land lying within the parish of Jefferson, described in the advertisements hereunto annexed and made part of this petition; that said plans accurately designate the limits of said section, and as much as possible, the subdivisions of the property therein contained and the names of the proprietors, and also the divisions and directions of the canals intended to be dug and the places where the steam engine is to be established, that true copies of said plans were deposited in the office of the parish recorder of the parish of Jefferson on the 11th of January, 1861, and notices inserted in French and English in the "New Orleans Commercial Bulletin" and the "New Orleans Daily Crescent," two newspapers published in the city of New Orleans once a week, during four weeks in succession, announcing that your petitioners were about to proceed to drain said section, describing the place where said plans were and are deposited, accurately de-

fining the limits thereof and indicating as near as possible the time within which the draining thereof will be completed, and the probable cost of said works, all of which will more fully and accurately appear by reference to the certificate of the parish recorder of the parish of Jefferson, and copies of said New Orleans newspapers containing said notices herewith filed;

The premises considered, your petitioners are entitled to and pray for a decree from this Hon. Court subjecting each portion of the property situated within the limits of said Second Draining District lying in the limits of the parish of Jefferson to a first mortgage lien and privilege in favor of your petitioners, the Board of Commissioners of the Second Draining District, for such amount as may be assessed on it for its portion of the whole cost of drainage of said section in accordance with the provisions of the statute by which said privilege lien and mortgage are created, and interest thereon at the rate of 6 per cent. per annum from demand thereof; and they pray for such other and general relief as the nature of the case and the law may require—and they will ever pray, etc., etc.

(Signed) C. ROSELIUS.

Endorsement on the foregoing petition: "In the Third Judicial District Court. No. 1938. Filed February 15, 1861. J. Regnaud, D. Clerk."

Order on the Foregoing Petition.

Considering that the judge of the 3d Judicial District Court is interested the result of this suit and must secure himself, it is ordered that this case be transferred to the 6th District Court of New Orleans.

Parish of Jefferson, March 14th, 1861.

(Signed) VICTOR BURTHE, Judge.

Judgement.

No. 1938 in the Third Judicial District Court in and for the Parish of Jefferson.

In the matter of the Board of Commissioners of the Second Draining District praying, etc.

The petitioners, the Board of Commissioners of the Second Draining District, ask for a decree in accordance with an act of the Legislature approved March 28th, 1902, "To provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," subjecting each portion of the property in said district within the parish of Jefferson to a first mortgage lien and privilege in their favor for such amount as may be assessed on it for its proportion of the whole cost of drainage.

Several parties have filed oppositions to this application based on various grounds, only two of which it is necessary here to consider, as all others will more properly arise in another proceeding. These two are *first* the constitutionality of the statute and *secondly* the observance of the formalities prescribed by said statute.

The grounds of unconstitutionality urged herein have been distinctly passed upon in the case of the New Orleans Draining Company praying, etc., reported in 11 An. 338, in which similar provisions were sustained by the Supreme Court and the right to make an assessment for similar purposes declared to be legal and constitutional.

As to the second ground of opposition to be considered it is admitted that the publications according to law, but it is contended that the plans are defective in not showing correct subdivisions and the names of the proprietors.

The statute provides that a plan shall be made "accurately designating the limits of the section or district to be drained, and as *far* as possible the subdivisions of the property therein contained and the names of the proprietors, etc." It is in proof that books showing the subdivisions of squares into lots, containing the names of the proprietors and readily referable to the plans, were deposited with said plans as a part thereof and to supply the deficiency in that respect in the plans. These plans and books are said to designate the limits of the section to be drained, and as far as possible the subdivisions of the property therein contained and the names of the proprietors, and they therefore meet the requirements of the law antecedent to the decree sought by petitioners.

It is therefore ordered that the oppositions herein filed

be dismissed with costs and without prejudice to the rights of the parties not herein expressly passed on. And it is further ordered, adjudged and decreed that each portion of the property situated within the limits of the Second Draining District and lying within the parish of Jefferson, and described in the advertisements and plans deposited by the Commissioners of the Second Draining District in the office of the Parish Recorder of said parish, as beginning at the Mississippi river at the boundary line between the parishes of Orleans and Jefferson, along said boundary line to Lake Ponchartrain, along the shores of said lake to the Jefferson & Ponchartrain Railroad, following said road to the river Mississippi and following the banks of said river to the starting point, be and is hereby subject to a first mortgage lien and privilege in favor of petitioners the Board of Commissioners of the Second Draining District for such amount as may be assessed upon said property for its proportion of the whole costs of draining said section in accordance with the provisions statute creating said first mortgage lien and privilege with interest thereon at six per cent. per annum from demand thereof.

(Signed) B. K. HOWELL,
Judge 6th District Court of New Orleans, acting in place of Judge Burthe recused.

Endorsement on foregoing judgement: No. 1935. In the matter of the Board of Commissioners of the Second Draining District praying for a decree of mortgage, etc. Judgment filed April 29, 1861. E. Buisson, Clerk.

"Homologation 2" exhibit from line 14 on page 6 to page 12 inclusive.

To the Hon. the Second Judicial Court of Louisiana in and for the Parish of Jefferson:

The petition of the Board of Commissioners of the Second Draining District,

Respectfully represents; that in conformity with an act of the Legislature entitled "An act to provide for the collection of the assessment for draining under the acts of March 18th, 1858, and the act supplementary thereto of

March 17th, 1859, approved March 1st, 1861, a tableau or assessment roll of amount to be paid for draining the property within the said Second Draining District (within the limits of the parish of Jefferson) has been prepared and notice thereof been duly given; that your petitioners herewith present a copy of said assessment to be filed in this Honorable Court; that in said assessment roll the property assessed is set forth together with the amount assessed and the names of the owners thereof as far as known, and in case the owner or owners are unknown said fact is stated, all of which together with other necessary particulars will more fully appear by reference to said copy of the assessment roll herewith exhibited and filed, and contained in books numbered respectively 1, 2 and 3.

Your petitioners therefore respectfully pray that in pursuance of said act of the Legislature it may please the court to order, that all persons whom it may concern, do show cause within thirty days from the first publication of said order, if any they have why said assessment roll should not be approved and homologated; that said order be published in the English and French languages in the Carrollton *Times* newspaper, twice a week for thirty days, and that after due proceedings had judgment be rendered approving and homologating said assessment roll, to operate as a judgment against the property assessed, and the owner or owners thereof for the amount of assessment with ten per centum in addition the amount assessed to pay cost and counsel fees, the whole according to the acts of the Legislature aforesaid found at pages 43 and 44 of the printed sessions of acts of 1861; and your petitioners pray for general relief—and as in duty bound, etc., etc.

(Signed) C. ROSELIUS and
ALFRED PHILIPS.

Order on the Foregoing Petition.

"*Order.*"

Upon filing the assessment roll of the Second Draining District within the parish of Jefferson, and on the petition

of the Board of Commissioners of said district it is ordered that all persons whom it may concern do show cause if any they have within thirty days from the first publication of this order, why said assessment roll should not be approved and homologated; and it is further ordered that said order be published in the English and French languages in the Carrollton *Times* newspaper twice each week for thirty days.

Dec. 7, 1868.

(Signed) DON A. PARDEE,
Judge 2nd Judl. Dist. Court, La.

Endorsement on the Foregoing Petition: "No. 1938. Second Judicial District Court of Louisiana, parish of Jefferson. In the matter of the Board of Commissioners of the Second Draining District for the homologation of tableau of assessment, etc., etc. Petition and assessment rolls in books Nos. 1, 2 and 3, etc. C. Roselius and Alfred Philips of counsel—filed Dec. 11, 1868. H. C. Caulkins, D'y Clerk."

Judgment.

Second Jud. Dist. Court, Parish of Jefferson. No. 1938.

In the matter of the Commissioners of the Second Draining District praying for homologation of tableau, etc.

On motion of C. Roselius and Alfred Philips of counsel for the petitioners herein and on producing to the court due proof of the publication of notices to all persons interested to show cause if any they have, why said assessment rolls or tableau filed by the said Board of Commissioners should not be approved and homologated, all made according to law. It is now ordered, adjudged and decreed that said report be approved and homologated so far as not opposed and the same to operate as a judgment against the property assessed and the owner or owners thereof with ten per cent. in addition to the amount for costs of counsel fees and costs according to the act of the Legislature, etc.

Judgt. rendered March 15th, 1869, and signed March 23, 1869.

(Signed) DON A. PARDEE, Judge.

Endorsement on foregoing judgment: No. 1938. Second Judicial Dist. Court, parish of Jefferson. In the matter of the Board of Commissioners of the Second Drainage Dist. praying for homologation of tableau, etc. Motion to homologate tableau, so far as not opposed, with proof of publication, etc., etc. C. Roselius & Alfred Phillips of counsel. Filed March 15, 1869. H. A. Burns, Dy. Clk.

Extract from the Assessment Rolls of the Second Drainage District, Parish of Jefferson, Filed in the Third Judicial District Court, Parish of Jefferson, on the 11th Day of December, 1868, and Referred to in the Foregoing Petition Praying for the Homologation of said Assessment Rolls and in the Judgment Homologating the Same Rendered on the 15th and Signed March 23, 1869, in Suit No. 1938 on the Docket of said Court.

Name of Owner.	Name of Street.	No. of Lot.	Measurement	Sup'rficial Feet.	Percentage.	Assessment.
City of Jefferson, Pleasance	Magazine	19, 20	64 x 127-4	8,148	2 Mills per sq. ft.	16 30
City of Jefferson, East Bouligney	Marengo	20, 21	58 x 120	6,960	"	13 92
Pioneer Fire Co. No. 1, East Bouligney	Berlin	22	30-2 x 120	3,620	"	7 24
City of Jefferson, East Bouligney		1 to 10	300-4 x 150	45,050	"	90 10
City of Jefferson, West Bouligney	Jersey	15, 16, 17, 18	120 x 100	12,000	"	24 00
City of Jefferson, West Bouligney	1 Sq.		305 x 300	91,500	"	183 00
City of Jefferson, Anest	¼ Sq.		150 x 153-4	23,000	"	46 00
City of Carrollton, Parish Court House and Jail	1 Sq.	20 lots	275 x 275	75,625	"	151 25
Carrollton Fire Co. No. 1	Dublin		34 x 120	4,080	"	8 16
City of Carrollton	Dublin	6	30 x 120	3,600	"	7 20
City of Carrollton	Third	11	41 x 150	6,150	"	12 30
City of Carrollton	Jefferson	6, 7, 8	90 x 120	10,800	"	21 60
City of Carrollton	Small strip on Fourth St		8-6 x 96-9	824-6	"	1 65
Town of Carrollton	Washington	7, 10	120 x 120	14,400	"	28 28
City of Carrollton	Whole Sq.		275 x 650	178,750	"	357 50
City of Carrollton, Green Square			300 x 300	90,000	"	180 00
City of Carrollton, Frederick Square	1 Sq.		300 x 300	90,000	"	180 00
City of Carrollton, Hamilton Square	Public Sq.		325 x 650	211,250	"	422 50
Town of Carrollton all the public streets in the town of Carrollton				20,068,500	"	40,137 00

City of Jefferson all the public streets in the city of Jefferson				26,931,000	"	53,862 00
All the public streets in Hurtsville, Police Jury Parish of Jefferson				3,299,560	"	6,599 12
All the public streets in Bloomingdale, Police Jury of the Parish of Jefferson				1,477,970	"	2,955 94
All the public streets in Burthville, Police Jury of the Parish of Jefferson				3,381,960	"	6,768 92
All the public streets running across the land of S. F. Foucher, Police Jury of the Parish of Jefferson				413,500	"	827 00
All the public streets in Greenville, Police Jury of the Parish of Jefferson				2,353,750	"	4,707 50
All the public streets in Fribourg, Police Jury of the Parish of Jefferson				1,898,775	"	3,797 55
All the public streets in Marly, Police Jury of the Parish of Jefferson				1,008,500	"	2,017 00
Market Square, Police Jury Parish of Jefferson	1 Sq.		90 x 300	27,000	"	54 00
Metairie Road, Police Jury Parish of Jefferson			3412 x 40	136,480	"	272 96

A true copy.
December 10, 1886.
(Seal)

JAS. C. BAUMANN,
Clerk and Ex-Officio Recorder Parish of Jefferson.

I, James C. Baumann, clerk of the Twenty-sixth Judicial District Court in and for the parish of Jefferson and custodian of the records of the late Second and Third Judicial District Court for the parish of Jefferson, do hereby certify that the foregoing pages 1, 2, 3, 4, 5, 6, 7, 8 and 9, contain true and correct copies of the original papers on file in my office; that no answers or oppositions, were filed in said proceedings by the city of New Orleans, the city of Carrollton, Jefferson City, or the police jury of the parish of Jefferson as appears by the docket of said court; that the judgments therein rendered are final and executory and that the foregoing page number eleven contains a true and correct extract from the copy of assessment rolls on file in my office in the above suit and referred to in the foregoing judgment of the court homologating said assessment rolls.

(Seal) (Signed) JAMES C. BAUMANN,
Clerk 26th Judicial District Court, Parish of Jefferson.
Gretna, Parish of Jefferson, December 10th, A. D. 1886.

Endorsed—2nd Judicial Dist. Court. In the matter of the Board of Draining Commissioners praying for homologation of assessment rolls, etc.—Copies of petition, judgts. and extracts from ass. rolls. (Written in red ink) $128,454.29 with interest and 10 per cent. counsel fees and costs. Exhibit "B" and "B 1."

Certificate of mortgage referred to in the foregoing petition filed February 15, 1861, and referred in pages 1 and 2 foregoing.

STATE OF LOUISIANA. }
Parish of Jefferson. }

I, Ernest Commagers, parish recorder for the parish of Jefferson, hereby certify that on this day, L. H. Place, Esq., president of the Commissioners of the Second Draining District, has deposited in this office three plans certified as true copies of originals on file within the office of said commissioners by A. S. Phelps, engineer of said draining district dated January 9th, 1861, said plans comprising all the portion of said draining district lying in the parish of Jefferson.

I also certify that said president has made a special

deposit in this office of three books of assessments comprising the subdivisions of the property included in said plans. The said three books of assessments not to be recorded, but simply deposited for examination by parties interested.

In faith whereof I have hereunto set my hand and seal at the court house, Carrollton, this eleventh day of January, eighteen hundred and sixty-one.

(Seal) (Signed) ERNEST COMMAGERE,
Recorder.

Endorsed—1938. Certificate of deposit of plans, etc., in the parish of Jefferson, January 11, 1861. Filed February 15th, 1861. J. Regaud, Dy. Clk.

Second Judicial District, Parish of Jefferson. No. 1938.

In the Matter of the Commissioners of the Second Draining District praying for Homologation of Tableau.

To the Honorable the Judge of the Second Judicial District Court, Parish of Jefferson:

The petition of the city of New Orleans, a municipal corporation chartered and duly organized under the laws of the State of Louisiana, located in the parish of Orleans, State aforesaid and of the Board of Administrators of the said city, respectfully represents;

That heretofore, to wit: on or about the 15th day of March, 1869, in the above entitled and numbered proceedings, a final judgment was duly rendered by this Honorable Court, and upon the 23d day of the same month was regularly signed, homologating and approving a certain tableau of assessments for draining purposes made under and in conformably to certain acts of the General Assembly of the State of Louisiana in that case made and provided.

That for greater certainty, your petitioners hereunto annex a copy of the aforesaid judgment, and make the same at part hereof and respectfully refer your honor to the tableau of assessments underlying such judgment.

That in the opinion of your petitioner it is unnecessary to take proceedings for the revival of the judgment had and obtained as aforesaid, but to prevent the rights of

all parties interested therein from being clouded over, and out of an abundance of caution your petitioners, without waiving or abandoning any privilge or right conferred by the aforesaid judgments desire to supplement the same by an order or decree of revival.

Wherefore, your petitioners pray that the several parties named and designated in the aforesaid tableau of assessments, and the owner or owners of all the property referred to therein whether such owners be known or unknown by an order of this honorable court to be made and granted herein, may be required to show cause, within thirty days from the first publication of such order, if any they have, why the judgments aforesaid should not be regarded as being revived, and possessing its original force and effect.

That an attorney *ad hoc* may be appointed by this Honorable Court to represent any and all of such defendants in the aforesaid judgment, as may be absent and not represented; that the said attorney may be cited to appear and answer this petition; that this cause may otherwise be proceeded in according to law; that after due proceedings had, the judgment aforesaid may be decreed to be revived and to have its original force and effect; and that petitioners may have such other and further order, judgment and decree as may be suited to law and the nature of this case.

(Signed) SAML. P. BLANC,
Assistant City Attorney.

Copy of Judgment Annexed to the Foregoing Petition.

(Copy)

2d Judl. Dist. Court, Parish of Orleans. No. 1938.

In the matter of the Commissioners of the Second Draining District praying for Hom'n. of Tableau, etc.

On motion of C. Roselius and Alfred Philips of counsel for the petitioners herein and on producing to the court due proof of the publication of notices to all persons interested to show cause if any they have why said assessment rolls or tableau filed by the said Board of Commissioners should not be approved and homologated all made according to law.

It is now ordered, adjudged and decreed that said report be approved and homologated as far as not opposed and the same to operate as a judgment against the property assessed and the owner or owners thereof with ten per cent. in addition to the amount assessed for costs of counsel fees and costs according to the act of the Legislature etc.

Judgment rendered March 15th, 1869, and signed March 23rd, 1869.

(Signed) DON A. PARDEE, Judge.

Order Granted on the Foregoing Petition.

Second Judicial District, Parish of Jefferson. No. 1938.

In the matter of the Commissioners of the Second Draining District praying for homologation of tableau,

Upon reading the foregoing petition, it is hereby ordered that the several parties named and designated in the tableau of assessments referred to in and homologated by a judgment of this court rendered upon the 15th day of March, 1869, in the above entitled and numbered proceeding, and signed on the 23d day of the same month do show cause within thirty days after the first publication of this order, if any they have why the said judgment shall not be revived and held to possess its original force and effect.

It is further ordered that Clark W. Beasancon, Esq., be and he is hereby appointed curator *ad hoc* to represent herein all such of the defendants in the original judgment as are "absent and not represented" and that the said curator *ad hoc* be cited and served with a copy of the petition for revival, herein filed.

(Signed) DON A. PARDEE,
Judge 2d Judicial District, La.

All Endorsed—No. 1938. Second Judicial District, parish of Jefferson.—In the matter of the Commissioners of the Second Draining District praying for homologation of tableau, etc. Petition and order for revival of judgment—Sam. P. Blanc, Assistant City Attorney. Filed Jan. 29, 1879. E. A. Flanheau, Clerk.

Second Judicial District, Parish of Jefferson. No. 1938.

In the matter of the Commissioners of the Second Drainage District praying for homologation of tableau.

And now before the court comes the city of New Orleans by Samuel P. Blanc, assistant city attorney and Intervenor Ed. C. Palmer by Lacy & Butler his counsel, and shows the same:

1. That the order to show cause why the judgment heretofore rendered herein should not be revived, and held to have its original force and effect, has been duly published in the Jefferson *Sentinel* and by posting at three public places in the parish of Jefferson:

2. That the delay required by law has expired without certain parties in interest therein having made any opposition to the aforesaid order, or rule, being made absolute, and;

3. That this appearer is desirous to have the judgment revived as against all parties, who have not made opposition thereto or otherwise appeared herein.

Wherefore, this appearer moves the court, that the rule or order, herein taken bearing date January 24, 1879, be made absolute so far as not opposed; and that as against any and all parties, who have failed to appear herein, or to file an opposition thereto that the judgment of this Honorable Court, homologating and approving a certain tableau of assessments in the Second Drainage District, rendered in the above entitled and numbered proceedings, on the 15th day of March, A. D. 1869, and signed on the 23d day of that month, be ordered, adjudged and decreed to be revived, and to have its original force and effect, with such other relief as the court may see proper to grant.

(Signed) SAM. P. BLANC,
Assistant City Attorney.

(Signed) LACY & BUTLER,
Attorneys.

Judgment.

Second Judicial District Parish of Jefferson, No. 1938.

In the matter of the Commissioners of Second Drainage District, praying for homologation of tableau.

On motion of Samuel P. Blanc, assistant city attorney for the city of New Orleans, and Lacy & Butler of counsel for intervenor, Ed. C. Palmer, and upon due proof of publication, in accordance with law, and the law and evidence authorizing the same:

It is hereby ordered, adjudged and decreed as against all parties who have failed to put in an appearance in this proceeding, and so far as the application for a revival has not been opposed, that the order herein granted bearing date Jany. 24, 1879, be and the same is hereby made absolute, and that the judgment herein sought to be revived, rendered by the court on the 15th day of March, A. D. 1869, and signed on the 23d of that month, approving and homologating a certain tableau of assessments, be and the same is hereby revived, and it is adjudged and decreed to have all of its original force and effect.

Judgment rendered April 9th, 1879.
Judgment signed April 18th, 1879.
(Signed) DON A. PARDEE, Judge.

Endorsed—No. 1938—Second Judicial District, Parish of Jefferson.—In the matter of the Commissioners of the Second Drainage District praying for homologation of tableau; motion for judgment of revival so far as not opposed—above Toledano. Sam. P. Blanc, Asst. City Atty. Filed April 9, '79. L. Soubles, Dy. Clk.

State of Louisiana, Parish of Jefferson—Clerk's Office, 26 Judicial District Court—*ss.*

I, John C. Tellotson, clerk of the Twenty-sixth Judicial District Court in and for the parish of Jefferson and custodian of the records of the late Third and Second Judicial District Courts for the parish of Jefferson, do hereby further certify that the foregoing 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st and 22d pages are true and correct copies of the original papers on file and of record in said clerk's office of said 26th Judicial District for the parish of Jefferson, that no opposition or answer was filed to any of said proceedings set forth in said pages 14 to 22 inclusive, by the city of New Orleans, the city of Carrollton, Jeffer-

son City or the Police Jury of the parish of Jefferson, and that no appeal has been taken from said proceedings, set forth in said pages from 14 to 22.

Parish of Jefferson, December 24, 1886.

(Signed) J. C. TELLOTSON,
Deputy Clerk 26th Judicial Dist. Court. (Seal)

Endorsed—No. 1938. 2nd Judicial Dist. Court. In the matter of the Board of Draining Commissioners, praying for homologation of *assessment rolls*, etc., copies of petition, judgments, extracts from assessment rolls and proceeding for revival of judgment, etc., (in red ink) $128,454.29 Exhibit B and "Homologation 2."

Exhibit "C."

Proceedings in the matter of the Board of Commissioners of the Second Draining District, praying, etc., decree of mortgage privilege rendered by Third District Court of New Orleans, in suit No. 15,846, on docket of said court, rendered and signed on 9th day of February, 1861.

Filed with and made part of bill, Nov. 26, 1894.
(Written in red ink)
Exhibit C from pages 1 to 3 inclusive,
& the first 14 lines of page 4, with
Clerk's Certificate on page 11.
(Stamps)

No. 15,846, Third District Court, parish of Orleans transferred to No. 9188 Seventh District Court, parish of Orleans, transferred from that court to 39,094 Fourth District Court, parish of Orleans, transferred from that court to No. 26,643 Third District Court, parish of Orleans, Superior District Court, parish of Orleans; transferred from that court to No. 25,393 and transferred from that court transferred to No. 18,995 Civil District Court, parish of Orleans. Filed October 20, 1886.

To the Hon. Hon. Louis Duvignaud, Judge of the Third District Court of New Orleans:

The petition of the Board of Commissioners of the Second Draining District through its president, L. H. Place,

Respectfully represents that agreeably to the provisions of an act entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, your petitioners have had two plans drawn by A. S. Phelps, engineer of said Draining District of a certain section of land within the parish of Orleans, described in the advertisements annexed to and made part of this petition; that said plans accurately designate the limits of said section, and as much as possible the subdivision of property therein contained and the names of the proprietors and also the divisions and directions of the canals intended to be dug and the places where the steam engines are to be established; that true copies of said plans were deposited in the office of the recorder of mortgages of the parish of Orleans on the 11th January, 1861, and notices inserted in French and English in the New Orleans *Commercial Bulletin* and the New Orleans *Daily Crescent*, two newspapers published in the city of New Orleans once a week during four weeks in succession, announcing that your petitioners were about to proceed to drain said section, describing the place where said plans are deposited, accurately defining the limits thereof and indicating as near as possible, the time within which the draining thereof will be completed and the probable cost of said work all of which will more fully and accurately appear by reference to the certificate of the recorder of mortgages of the parish of Orleans, and copies of said New Orleans newspapers containing said notices herewith filed;

The premises considered your petitioners are entitled to and pray for a decree from this Honorable Court subjecting each portion of the property situated within the limits of said Second Draining District lying within the parish of Orleans, to a first mortgage privilege and lien in favor of your petitioners, the Board of Commissioners of the Second Draining District for such amount as may be assessed on it for its proportion of the whole cost of drainage of said section in accordance with the provisions of the statute by which said privilege and mortgage and lien are created, and interest thereon at the rate of 6 per cent. per annum from demand thereof and they pray for

all such other and general relief as the nature of the case and the law may require, and they will ever pray etc.

(Signed) C. ROSELIUS.

Office Recorder of Mortgages, Parish of Orleans, La.

I, John Holmes, recorder of mortgages hereby certify that on the 11th day of January, 1861, L. H. Place, Esq., president of the Second Draining District has deposited in this office two plans certified as true copies of original on file in the office of said commissioners by A. L. Phelps, engineer of said draining district, and dated 9 January, 1861, said plans comprising all the portion of said draining district lying in this parish, and also has deposited in this office four books of assessments, comprising the subdivisions of the property included in said plans and the amounts required to be paid by the owners of said subdivisions in order to defray the estimated cost of drainage.

In faith whereof, I have hereunto set my hand and seal at the mortgage office aforesaid.

(Seal) (Signed) COLOMB DAVIS, Dy. Rec.

Endorsed—Certificate of deposit of plans, etc., in the parish of Orleans, Jan. 11th, 1861. 15,846. Filed Feb. 9th, 1861. I. Gonelles, Dy. Clerk.

Judgment on Foregoing Petition.

Decree—Proof having been made of the publications and deposit of plans in the mortgage office of the parish of Orleans by the Commissioners of the Second Draining District, agreeably to the provisions of the law, it is decreed that each portion of the property situated within the limits of the Second Draining District and lying within the parish of Orleans as described in said advertisements as beginning at the Mississippi river at the upper side of Julia street, along Julia street to Mobile landing, along said landing to Delord street, along Delord street and the upper side of the Canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the line between the parish of Orleans and Jefferson, following said parish line to the river Mississippi and

following the banks of said river to the starting point, be and is hereby subjected to a first mortgage lien and privilege in favor of said Board of Commissioners of the Second Draining District, for such an amount as may be assessed on it for its portion of the whole costs of drainage of said portion in accordance with the provisions of the statute by which said mortgage lien and privilege are created, with interest thereon at the rate of 6 per cent. per annum from demand thereof.

(Signed) Ls. DUVIGNAUD, Judge.

New Orleans, February 9th, 1861.

Endorsed on foregoing petition. "In the Third District Court of N. O. No. 15846. In the matter of the Board of Commissioners of the Second Draining District praying for a decree of mortgage privilege etc., etc., etc. Filed February 9th, 1861. (Signed) D. Jonelle, Dy. Clerk."

(Written in red ink) Exhibit "Homologation 3" "C1" from line 14 page 4 to page 11 inclusive.

A true copy:

DON GORDON,
Dy. Clerk.

No. 15846, Third District Court, parish of Orleans transferred to No. 9188 7th District Court, parish of Orleans, transferred to No. 25,393 3d Dist. Court, parish of Orleans, transferred to No. 18995 Civil Dist. Court, parish of Orleans; filed Oct 2, 1886.

To the Hon. C. M. Emerson, Judge of the Third District Court of New Orleans:

The petition of the Board of Commissioners of the Second Draining District respectfully represents: that, in conformity with the act of the Legislature, entitled "An act to provide for the collection of the assessment for draining, under the acts of March 18, 1858, and the act supplementary thereto, of March 17, 1859," a tableau or assessment roll of the amount to be paid for draining the property within the said Second Draining District (within the parish of Orleans) has been prepared, and notice thereof has been duly given; that your petitioners herewith present a copy of said assessment, to be filed in this

Honorable Court; that in said assessment roll the property assessed is set forth, together with the amount assessed and the names of the owners thereof, as far as known, and in case the owner or owners are unknown, said fact is stated; all of which, together with other necessary particulars, will more fully appear by reference to said copy of the assessment roll, herewith exhibited and filed and contained in bound volumes numbered 1, 2, 3 and 4.

Your petitioners, therefore, respectfully pray that, in pursuance of said act of the Legislature, it may please the court to order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days, and that after due proceedings had, judgment be rendered approving and homologating said assessment roll, to operate as a judgment against the property assessed and the owner or owners thereof, for the amount of assessment, with 10 per cent. in addition to the amount assessed to pay costs and counsel fees the whole according to the act of the Legislature aforesaid found at pages 43 and 44 of the printed session acts of 1861; and your petitioners pray for general relief, and as in duty bound, etc., etc.

(Signed) C. ROSELIUS and
ALFRED PHILIPS.

Endorsed—In the Third District Court, No. 15,846. In the matter of the Board of Commissioners of the Second Draining District, praying for homologation of assessment roll, etc., etc. Petition and Assessment Roll 1, 2, 3 and 4. C. Roselius and Alfred Philips of Counsel. Filed June 16th, 1868. J. O. Chalon, Dy. Clk."

Order on Foregoing Petition.

Upon filing the assessment roll of the Second Draining District within the parish of Orleans and on the petition of the Board of Commissioners of said Draining District, it is ordered that all persons whom it may concern do show cause if any they have within thirty days from the

first publication of this order why said assessment roll should not be approved and homologated, and it is further ordered that said order be published in the English and French languages in the New Orleans *Bee*, newspaper twice each week for thirty days.

New Orleans, June 16, 1868.

(Signed) CHAS. M. EMERSON, Judge.

A true copy.

DON GORDON, Dy. Clerk.

No. 15,846 3d Dist. Court, parish Orleans transferred to No. 9188 7th District Court, parish of Orleans, transferred to No. 25,393 3d District Court, parish of Orleans, transferred to No. 18,995 Civil District Court, parish of Orleans, filed Oct. 20, 1886.

Third District Court, No. 15,846.

In the matter of the Board of Commissioners of the Second Draining District, praying for the homologation of assessment roll, etc., etc.

On motion of C. Roselius and Alfred Philips of counsel for the Board of Commissioners of the Second Draining District and on producing to the court due proof of the publication of notices in the English and French languages during thirty days, in the New Orleans *Bee* a daily newspaper published in the city of New Orleans, to all persons interested, to show cause, if any they have, why said assessment roll filed by said Board of Commissioners should not be approved and homologated and made according to law, and on further producing proof that no opposition has been filed to the homologation and approval of the same;

It is ordered, adjudged and decreed that said report and assessment roll be approved and homologated; and to operate as a judgment against the property therein assessed and against the owner or owners thereof with ten per centum in addition to the amount assessed for counsel fees and costs, all according to the act of the Legislature No. 57 approved March 1st, 1861.

Judgment rendered November 11th, 1868.

Signed November 16th, 1868.

(Signed) CHAS. M. EMERSON, Judge.

A true copy. DON GORDON, Dy. Clerk.

I certify that no opposition has been filed to the homologation of the assessment rolls herein.

New Orleans, Nov. 11, 1868.

J. O. CHALON, Dy. Clk.

Endorsed—"15,846. Third District Court. In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc., etc. Motion made to homologate, etc., etc., with proof of publication according to law, etc., etc. C. Roselius and Alfred Phillips, of Counsel."

A true copy:

DON GORDON, Dy. Clerk.

...Assessment Rolls and in the ...Assessment Rolls and Rendered on the 11th and ...November, 1858.

Name of Owner of Land.	Name of Street.	Nos. of Lots.	Measurement.	Superficial Feet.	Percentage.	Assessment.
Square 118. Annunciation, Erato, Galeonne and Constance.					2 Mills per. sq.ft.	
City of New Orleans	Galeonne		131 84	11.296		22 59
Square 119. Clio, St. Charles, Calliope and Carondelet.						
City of New Orleans, Engine House	Calliope		23[6] 123	2.870		5 74
Square 120. Thalia, Dryades, Erato and Rampart.						
City of New Orleans	Dryades		96 127[10]	12.250		24 51
"	" and Erato.		64 "	8182		16 36
Square 121. Commerce, Tchoupitoulas, Julia and St. Joseph.						
City of New Orleans	St. Joseph		26[6] 89[9]	2424		4 85
Square 122. Annunciation, Clio, Baronne and Dryades.						
[illegible]	Erato		108 159[9]	17260		34 52
Square 123. Commerce, Tchoupitoulas, Race, Peters and Orange.						
City of New Orleans, Engine House	Tchoupitoulas	5	26[1] 122	3392		6 78
Square 124. Annunciation, Thalia, Peter and Hunter.						
City of New Orleans, Engine House	Hunter		25 96	2400		4 80
Square 125. Orange, St. Thomas, Richard and Chippewa.						
City of New Orleans, School	Chippewa		80 128	10240		20 48
Square 126. Annunciation, Terpsicore, Chippewa and Robin						
City of New Orleans (Police)	Chippewa	2 1	64 55[9]	35.52		7 10
Square 151. Terpsichore, Magazine, Robin and Camp.						
City of New Orleans, School	Magazine		160 128	20480		40 96
Square 150.						
City of New Orleans	Dryades Market		256 128	32.768		65 54
Square 251. Thalia, Baronne, Melpomene and Dryades.						
City of New Orleans, Engine House	Thalia		32 128	4096		8 19
Square 302. St. Patrick, St. David, Washington and Sixth.						
New Cemetery, City of New Orleans	Square		448 300	134.400		268 80
Square 318. Franklin, Liberty, Philip and Race.						
City of New Orleans	Fraction			14.40		2 88

Square 314. Howard, Freret, Sixth, Washington.					
City of New Orleans.....Public Square.....		258 352	90.816		181 63
Square 342. Howard, Freret, Fourth and Third.					
City of New Orleans.....Public Square.....	1 a 22	254 352	89.408		178 82
Square 68. Levee, Rousseau, Sorapuru and Philip.					
Engine House.....Levee.....	21	32 103	3.296		6 59
Square 38. Religious, Rousseau, St. Mary and Felicity.					
Engine House.....	3	27⁶ 127¹⁰	3.518		7 04
Square 42. Rousseau, St. Thomas Jackson and Philip.					
Recorder's Office, City of New Orleans.....Rousseau.....	93	64 158⁸	1016		20 32
Hook and Ladder Co., City of New Orleans..Jackson.....	4	30 115	3.448		6 90
Square 78. Chippewa, Annunciation, 2d and 3d.					
City of New Orleans.....Clay Square.....		252 320	80640		161 28
Square 100. Annunciation, Laurel, Philip and Jackson.					
City of New Orleans, School.....Philip.....	13 17	162 120	19 200		39 40
Square 128. Laurel, Constance, Eighth and Ninth.					
City of New Orleans, School.....Ninth.....	18, 19, 20	96 126	120.96		24 20
Square 124. Constance, Magazine, Harmony and Ninth.					
City of New Orleans, Market.....Magazine.....	1	38 100	3800		7 60
City of New Orleans, School.....Constance.....	4 5	68 100	6800		13 60
Square 142, 143, Magazine, Camp and St. Mary.					
City of New Orleans, Market.....Square.....			21890		43 78
Square 151. Magazine, Camp, Fourth, Washington.					
City of New Orleans, Engine House.....Washington.....	17	24 103	2472		4 94
Square 190. Chestnut, Coliseum, Jackson and Philip.					
City of New Orleans, High School.....Chestnut.....	19, 20	69⁴ 127⁷	8879		17 76
Square 206. Coliseum, Prytania, Sixth and Washington.					
Lafayette Cemetery.....Square.....		451 429	193479		386 96
Square 197. Coliseum, Prytania, Washington and Fourth.					
City of New Orleans.....Washington.....	15	44⁶ 129	5740		11 48
Square 240. St. Charles, Carondelet, Philip and Jackson.					
City of New Orleans, School.....Philip.....	21	27 131	3536		7 06
City of New Orleans, School.....Carondelet.....	5, 6	75 148	11.100		22 20
Square 264. Annunciation, Laurel, First and Philip.					
City of New Orleans, School.....Laurel.....	248 a	77 160	12310		24 64
All the squares, public squares, (not especially assessed) streets, always, in the portion of the district					
City of New Orleans.....			34.863.950		69,727 90

I, Don Gordon, deputy clerk of the Civil District Court for the parish of Orleans do hereby certify that the foregoing pages 1, 2, 3, 4, 5, 6, 7 and 8 are true and correct copies of the original on file in clerk's office Civil District Court, parish of Orleans; that no opposition or answer was filed therein by the city of New Orleans as appears from the entries in the original dockets of said courts and that the judgments therein rendered are final and executory, and that the foregoing pages 9 and 10 are true and correct extracts from the copy of assessment roll marked No. 1, No. 2, No. 3 and No. 4 respectively on file in clerk's office in the foregoing entitled and numbered cause and referred to in the foregoing judgments homologating said assessment rolls.

(Seal) (Signed) DON GORDON,
Dy. Clerk Civil District Court.

Certificate of Recorder of Mortgages referred to in foregoing petition and judgment thereon filed February 9th, 1861 to be found at pages 1, 2, 3, 4 of the foregoing papers.

(Stamps) Office Recorder of Mortgages,
Parish of Orleans, La.

I, John Holmes, Recorder of Mortgages hereby certify that on this 11th day of January, 1861, L. H. Place, President of the Board of Commissioners of the Second Draining District has deposited in this office two plans certified as true copies of originals on file in the office of said commissioners by A. S. Phelps, engineer of said draining district and dated 9th January, 1861, one plan comprising all the portion of said draining district lying in this parish and also has deposited in this office four books of assessments comprising the subdivisions of the property situated in said place and the amounts required to be paid by the owners of said subdivisions in order to defray the estimated cost of drain-

In witness whereof I have hereunto set my hand and seal

(Signed) COLOMBE DAVIS,
Dy. Rec.

Endorsed—Certificate of deposit of plans, etc. in the parish of Orleans, Jany. 11, 1861. 15846. Filed Feby. 9th, 1861. D. Jonelle, Dy. Clerk.

State of Louisiana, Parish of Orleans, Clerk's Office Civil District Court, Parish of Orleans.

I, Don Gordon, deputy clerk Civil District Court, parish of Orleans, do hereby certify that the foregoing page contains a true and correct copy of the original on file in said clerk's office of said Civil District Court in the above entitled matter now No. 18995 of said Civil District Court

(Seal) (Signed) DON GORDON,
Dy. Clerk.

3d District Court, Par. of Orleans. No. 25393. Now transferred to 18995 Civil District Court, parish of Orleans, and filed Oct. 20 '86.

In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc. etc.

To the Honorable Francis A. Monroe, Judge of the Third District Court for the Parish of Orleans:

The petititon of the Board of Administrators of the city of New Orleans and of the city of New Orleans respectfully represents:

That in conformity with the act of the Legislature of the State of Louisiana entitled "An act to provide for the collection of the assessment for draining under the acts of March, 1858, and the act supplementary thereto of March 17th, 1859, a tableau or assessment roll of the amount to be paid for draining the property in the Second Draining District (within the parish of Orleans) was prepared and notice thereof duly given

That on the 16th day of June, 1868, the Board of Commissioners of the Second Draining District filed their petition with a copy of the assessment roll of the Second Draining District (within the parish of Orleans) contained in bound volumes numbered 1, 2, 3 and 4, in the Honorable the Third District Court of New Orleans in the

suit or proceeding entitled: In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc., number 15,846 of the docket: that on said assessment roll the property assessed was set forth, together with the amount assessed and the names of the owners thereof as far as known; and in case the owner or owners were unknown said fact was stated; and in said petition said commissioners prayed said court to order that all persons whom it might concern should show cause within thirty days from the first publication of said order, if any they had, why said assessment roll should not be approved and homologated; that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days; and that after due proceedings had judgment be rendered approving and homologating said assessment roll to operate as a judgment against the property assessed and the owner or owners thereof, for the amount of the assessments, with ten per cent. in addition to the amount assessed to pay costs and counsel fees; the whole according to the acts of the Legislature aforesaid, found at pages 43 and 44 of the printed sessions acts of 1861.

That upon said petition and order of said court was duly granted in words and figures following, to-wit: "That upon filing the assessment roll of the Second Draining District (within the parish of Orleans) and on the petition of the Board of Commissioners of said Draining District, it is ordered that all persons whom it may concern do show cause, if any they have within thirty days from the first publication of this order, why said assessment roll should not be approved and homologated. And it is further ordered that said order be published in the English and French languages in the New Orleans *Bee* newspaper twice each week for thirty days."

"CHAS. M. EMERSON, Judge.

"New Orleans, June 16th, 1868."

That subsequently, to-wit: on the 11th day of November, 1868, after due advertisement, proceedings and delays a final judgment was rendered upon said petition as follows, viz.:

Third District Court, No. 15,846.

In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc., etc.

On motion of C. Roselius and Alfred Phelps of counsel for the Board of Commissioners of the Second Draining District, and on producing to the court due proof of the publication of notices in the English and French languages during thirty days in the New Orleans *Bee* a daily newspaper published in the city of New Orleans to all persons interested, to show cause if any they had why said assessment roll filed by said board of commissioners should not be approved and homologated according to law. And on further producing proof that no opposition has been filed to the homologation and approval of the same,

It is now ordered, adjudged and decreed that said report and assessment roll be approved and homologated, and to operate as a judgment against the property therein assessed and against the owner or owners thereof with ten per centum in addition to the amount assessed for counsel fees and costs; all according to the Act of the Legislature No. 57 approved March 14, 1861.

Judgment rendered November 11, 1868, signed November 16, 1868.

CHAS. M. EMERSON, Judge.

All of which will more fully appear and at large appear by reference to the aforesaid proceedings, and record No. 15,846 of the docket of the late Third District Court of New Orleans.

Your petitioner further shows unto your Honor that by Act No. 30 of the Sessions Acts of the General Assembly of the State of Louisiana for the year 1871 entitled "an act to provide for the drainage of New Orleans" your petitioners were therein and thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts within the limits of New Orleans and Carrollton and were authorized and required to collect from the holders of property within the said districts the balance due on the assess-

ments as shown by the books of the First, Second and Third Drainage Districts under the acts of March 18, 1859, and March 17, 1859, and the several supplementary and amendatory acts thereto.

That with a view to the proper exercise and performance of the rights, duties and privileges of your petitioners in the premises and out of an abundance of caution, your petitioners desire to have the aforesaid decree and judgment in the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc. No. 15,846 of the docket of the late Third District Court of New Orleans rendered on the 11th and signed on the 16th of November, 1868, and transferred to this Honorable Court and numbered 25,393 of the docket revived in conformity law.

Wherefore, your petitioners pray that citation may issue herein, citing and admonishing all persons whomsoever it may concern to show cause if any they have or can why said judgment of homologation should not be revived; that said citation be made in manner and form as required by law and that after due proceedings had judgment may be rendered herein reviving said judgment rendered as aforesaid in the matter of the Board of Commissioners of he Second Draining District praying for homologation of assessment roll, etc., etc. No. 15,486 of the docket of the late Third District Court of New Orleans. And as in duty bound petitioners pray for general relief in the premises.

(Signed) B. F. JONAS,
City Attorney.
S. P. BLANC,
Of Counsel.

Order Attached to Foregoing Petition.

State of Louisiana, Third District Court for the Parish of Orleans. No. 25,393.

In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc.

Whereas, a petition has been filed herein by the board of administrators of said city the legal successors and representatives of the late Board of Commissioners of the

Second Draining District for the revival of the judgment rendered in the matter of "The Board of Commissioners of the Second Draining District praying for homologation of assessment rolls" and being No. 15,846 of the docket of the late Third District Court of New Orleans which was rendered on the 11th and signed on the 16th day of November, 1868;

Now all persons whom it may concern and all persons owning property affected thereby are hereby cited to appear and show cause, if any they have or can within thirty days from the first publication hereof why said judgments of homologation should not be revived.

New Orleans, November 9, 1878.

(Signed) F. A. MONROE,
Judge.

Endorsed—No. 25,393. Third District Court, parish of Orleans. In the matter of the Board of Commissioners of the Second Draining District praying for homologation of assessment roll, etc., etc.

Petition for revival of judgment.

B. F. JONAS, City Atty.
SAM. P. BLANC, of Counsel.

Filed November 9, 1878.

JOE. GARIDEL, Dy. Clk.

Endorsed—No. 18,995. Civil District Court. In the matter of the Board of Commissioners, Second Draining District. Copies of petitions praying judgment decreeing mortgage lien and privilege and homologating assessment rolls with extracts from same showing amount of judgts. against city of New Orleans. (Written in red ink) $71,431.18 with interest. Exhibit "C" and Homologation "3."

Exhibit "D."

Proceedings "In matter of City of New Orleans praying for decree of mortgage privilege, etc.," upon property in Third Draining District (said city acting under said Act 30 of 1871) duly rendered by Eighth District Court, parish of Orleans, No. 7482 on docket of said court, on 4th day of May, 1872.

Filed with and made part of bill of complaint, November 26, 1894.

(Written in red ink)
Exhibit D from pages 1 to 4 inclusive with first five lines on 5th page together with clerk's certificate on page 13 and 14.
(Stamps)

No. 7482 of the late 8th District Court, parish Orleans transferred to No. 26622 Superior District Court, transferred to No. 25394, Third District Court, parish of Orleans, transferred to No. 5608, Civil District Court, parish of Orleans.

To the Honorable the Judge of the Eighth District Court of the Parish of Orleans:

The petition of the city of New Orleans subrogated by law to all the rights, powers and facilities possessed and enjoyed by the Commissioners of the Third Draining District and of any corporation charged with the duty of draining and leveeing within the limits of the said districts herein appearing as subrogee as aforesaid, respectfully represents;

That agreeably to the provisions of an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson" approved March 18th, 1858, your petitioner has had a plan drawn by W. H. Bell, city surveyor of said city of a certain section or district of land lying within the parish of Orleans—described in the advertisements hereto annexed and made part hereof, and in the said act as lying within the following limits: from the river Mississippi at St. Peter street along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Ponchartrain, along the shores of said lake to Lafayette avenue, following said avenue to the river Mississippi, along the banks of said river to the starting point.

That said plans consisting of two maps and the accompanying tableau contained in five books accurately designates the limits of said section, and as much as possible,

the subdivisions of property therein contained and the names of proprietors and also the divisions and directions of the canals intended to be dug and everything that is by the law required.

That a true copy of said plan was deposited in the office of the recorder of mortgages of this parish on the second day of March, 1872, and notices inserted in French and English in the New Orleans *Republican* and the New Orleans *Bee*, two newspapers published in the city of New Orleans, once a week during four weeks in succession, announcing that your petitioner is about to proceed to drain said section or district, describing the place where said plan is deposited, accurately defining the limits of said district, and indicating as nearly as possible, the time within which the draining thereof will be completed and the probable cost of said work; all of which will more fully appear by reference to the certificate of the recorder of mortgages, and copies of said newspapers containing said notices, herewith filed.

Wherefore, the premises considered, your petitioner is entitled to and prays for a decree from this Honorable Court subjecting each portion of the property situated within the limits of said Third Draining District to a first mortgage lien and privilege in favor of your petitioner in the capacity aforesaid for such amount as may be assessed on it for its proportion of the whole cost of the drainage of said section, in accordance with the provisions of the statute by which said privilege, lien and mortgage are created, and interest thereon at the rate of 6 *per cent. per annum* from demand thereof; and petitioner prays for such other and general relief as the nature of the case and the law may require.

And as in duty bound, etc., etc.

(Signed) RUFUS WAPLES,
Attorney for Petitioner.

A true copy.
DON GORDON, Dy. Clerk.

Endorsement on the foregoing petition: "7482 Eighth District Court. In the matter of the city of New Orleans, praying for a decree of mortgage privilege, etc.,

upon the property of the Third Draining District. Petition. Rufus Waples, Attorney. Filed 16 April, 1872. Robert Lynne, Deputy Clerk."

Judgment on the Foregoing Petition.

Considering the law and the performance by the petitioner of the necessary preliminaries and duties therein required, it is ordered, adjudged and decreed that each portion of the property situate within the limits of the Third Draining District in the parish of Orleans, and described in the advertisements and plans deposited by the city of New Orleans in the office of the recorder of mortgages of said parish as lying within the following limits: From the River Mississippi at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Ponchartrain, along the shores of said lake to Lafayette avenue, following said avenue to the River Mississippi, and along the banks of said river to the starting point, be and is hereby subject to a first mortgage lien and privilege in favor of the petitioner, the city of New Orleans, in its capacity described in said petition and in the law as the subrogee to "all the rights, powers and facilities possessed and enjoyed" heretofore by the "Board of Commissioners of the Third Draining District and of any corporation heretofore charged with the duty of draining and leveeing within the limits of the said district" for such amount as may be assessed upon said property for its proportion of the whole cost of draining said district in accordance with the provisions of the statute creating said first mortgage lien and privilege, with interest thereon at six per cent. per annum from demand thereof.

New Orleans, 4 May, '72.

(Signed) HENRY C. DIBBLE, Judge.

Endorsed—"Filed 4 May, '72. Robert Lyne, Dy. Clk."

A true copy.

DON GORDON, Dy. Clerk.

(Written in red ink) "Exhibit "Homologation 4" from 7th line of page 5 to page 14 inclusive.

Petition.

Filed June 17, 1872.

Eighth District Court, Parish of Orleans, No. 7482.

In the matter of the city of New Orleans praying for the homologation of assessment roll, etc.

To the Honorable the Judge of the Eighth District Court:

The petition of the city of New Orleans subrogated by law "to all the rights, powers and facilities" possessed and enjoyed by the commissioners of the several draining districts and of any corporation charged with the duty of draining and leveeing within the limits of the said district herein appearing as subrogee as aforesaid, respectfully represents;

That in conformity with the statute of the State entitled "An act to provide for the collection of the assessments for drainage under the acts of March 18, 1858, and the act supplementary thereto of March 17, 1859," a tableau or assessment roll of the amount to be paid for the purpose of draining and leveeing the property within the Third Draining District described by law and by the petition heretofore filed in these proceedings has been prepared by your petitioner as required by the acts aforesaid and the act entitled "An act to provide for the drainage of New Orleans" No. 30 of the acts of 1871 and due notice thereof has been given; that your petitioner has filed a copy of said tableau or assessment roll in this court, and in these proceedings, in which the property assessed is set forth and described together with the amount assessed and the name of the owner thereof as far as known and in case the owner or owners are unknown, said fact is stated; all of which together with other necessary particulars will more fully appear by reference to said copy, containing altogether 546 pages, the first volume from 1 to 95th page inclusive the second from the 96th to the 190 inclusive the third from the 191st to the 305th inclusive, the fourth from the 306th to the 424 inclusive; and the fifth from the 425 to the 546th page inclusive, now marked by the clerk A, B, C, D, E, respectively to identify them herewith and your petitioner makes them part of this petition.

That your petitioner is by law charged to make assessments in those parts of the three draining districts as existing under and created by the acts of March, 18, 1858, and March 17, 1859, and amendments thereto and on such other lands as are brought within the protection levees contemplated by the act above cited of the session of 1871, "where no assessments have been made, and to execute and enforce the same as provided by the several acts of the Legislature creating and regulating said boards of draining commissioners."

And your petitioner avers that all the preliminaries required of your petitioner have been complied with, contract made, etc., and that prior to the passage of said act of 1871 no assessment for draining and leveeing purposes under the act of 1858 and its supplements had ever been made upon the lands in the said Third Draining District.

Your petitioner therefore prays the court to order that all persons whom it may concern do show cause within thirty days from the publication of the order to that effect if any cause they have, why said assessment roll should not be approved and homologated, that said order be published in French and English in the official journal twice a week for thirty days; and that after due proceedings had, judgment be rendered approving and homolgating said assessment roll to operate as a judgment against the property assessed and the owner or owners thereof respectively, for the amount of assessment against each for the purpose of paying the expenses of the draining and leveeing the said Third Drainage District as contemplated by all the acts aforesaid with ten per centum in addition to the amount assessed to pay cost and counsel fees as provided by law and six per cent. per annum interest from the date of the assessment in accordance with the said acts of the General Assembly, and that said amounts be collected in the manner provided by said acts.

And your petitioner prays for all other and further necessary orders and for general relief.

(Signed) RUFUS WAPLES,
Atty. for Petitioner.

Order.

The assessment roll of the Third Draining District having been filed in court and the city of New Orleans as successor and subrogee of the Board of Commissioners of the several draining districts having filed a petition for the homologation of said assessment roll, it is

Ordered that all persons whom it may concern do show cause, if any they have within thirty days from the first publication of this order why said assessment roll should not be approved and homologated. And it is further ordered that this order be published in the English and French languages in the New Orleans *Republican* newspaper twice each week for thirty days.

New Orleans, June 17, 1872.

(Signed) HENRY C. DIBBLE, Judge.

Eighth District Court for the Parish of Orleans.

No. 7482.

In the matter of the city of New Orleans praying for a decree of mortgage privilege, etc., upon the property of the Third Drainage District.

On motion of Rufus Waples, attorney for the petitioner in the above entitled case, and on producing to the court due proof of the publication of notice by the publication of the order of this court in the English and French languages, twice a week during thirty days, in the New Orleans *Republican*, a daily newspaper published in the city of New Orleans, to all persons interested to show cause why the assessment roll filed by said petitioner should not be approved and homologated according to law, and on further suggesting that all legal requirements have been observed,

And on further suggesting that he herewith files a certificate of the clerk to this Honorable Court that no opposition to the homologation of said assessment roll has been filed, it is now ordered, adjudged and decreed that the law and the evidence considered that said assessment roll be and is hereby approved and homologated; and this approval and homologation shall operate as and is a judgment against the property described as assessed in

said roll and also against the owner or owners of each property respectively with ten per centum in addition to the amount assessed for counsel fees and costs, as provided by law, with interest at the rate of six per centum per annum on each amount from the date of the assessment thereof according to law.

Judgment rendered Nov. 8th, 1872, and signed Nov. 13, 1872.

(Signed) HENRY C. DIBBLE, Judge.

This day, December 15, 1886, exhibited to me a true copy of a copy duly certified to of the original, being now missing from this office.

(Signed) DON GORDON,
Dy. Clerk Civil District Court, Parish of Orleans.

Extract from the Assessment Roll of the Rural District Rated in the Eighth Division, County of [illegible]

For the Financial Year ending 31st March, 1874. Assessment made in the year 1873, and Returned to the Division Court for the [illegible] Division, on the [illegible] day of [illegible] 1873.

Showing the Names of Persons Rated, Nature of Property Rated, Amount of Assessment, and Rate in the Pound on the Assessed Value of Property and Income.

Names of Persons Rated.	Nature of Property Rated.	Amount of Assessment.	Rate in the £ on Assessed Value.	Amount of Rate.
		£		£

Extract from the Copy of Assessment Rolls of the Third District, Filed in the Eight District Court, Parish of Orleans, on the 4th day of May, 1872, and Referred to in the Petition Praying for the Homologation of said Assessment Rolls and in the Foregoing Judgment Homologating said Assessment Rolls, Rendered on the 8th and Signed on the 13th November, 1872.

Names of Owners of Land.	Name of Street.	No. Lot.	Measurement.	Superficial Feet.	Percentage.	Assessment.
Square 3. St. Anne, Dumaine, Decaturu, Public Road.						
City of New Orleans	Meat Market		320 60	19,200		38 40
Square 10. Decatur, Peters, St. Philip.						
City of New Orleans	French Market			5,680		11 35
Square 11. St. Philip, Peters, Decaturu, Urselines.						
City of New Orleans	Vegetable Market			29,731		59 25
Square 24. Decaturu, Chartres, St. Peter, St. Anne.						
City of New Orleans	Jackson Square			115,921		231 85
Square 45. Chartres, Royal, Orleans, both sides.						
St. Anthony Square	Royal	2	150.107	16,050		32 10
Square 46. St. Anne, Orleans, Chartres, Royal.						
City Court House	Chartres		117.200	23,400		46 80
Square 43. Chartres, St. Peter, Orleans, Exchange alley.						
State Arsenal and Court House	Orleans and St. Peter	3	107.125	13.493		27 00
Square 82. Hospital, Dauphine, Barracks, Burgundy.						
City of N. O., Barracks School House	Barracks	9	60.118	7,080		14 15
Square 113. St. Philip, Dumaine, Rampart, St. Claude.						
Engine House No. 10, City of N. O.	Dumaine	21	33.107	3,531		7 05
Square 115. St. Peter, St. Anne, Rampart, St. Claude.						
City of New Orleans	Place D'Armes or Congo Square		370 320	118,400		236 80
Square 149. St. Anne, Orleans, Liberty and Marais.						
Parish Prison and Police Jail				35,779		71 55
Square 166. Orleans, both sides Marais to Robertson.						
Treme Market			57.256 255	29,184		58 35
Square 167. Orleans, St. Anne, Marais, Villere.						
School House, City	do to Orleans	13	141.81	11,421		22 85
Square 210. Orleans, St. Peters, Claiborne, Derbigny.						
Engine House 21	S. Claiborne & St. Peter	1	57.74	4,218		8 45

Square 211. St. Peters, Carondelet Walk, Claiborne and Derbigny.					
Public School House ..... Cla. Ca. W. to St. Peter	1	30.182	5,460		10 95
Square 230 and 231. Derbigny, Bayou R., Roman, Barracks, Esplanade.					
City of New Orleans ..... Bayou R. and Roman..	5	51.61	3,111		6 20
Square 289. Barracks, Bayou R., Galvez. Miro, Esplanade.					
Engine House No. 3 ..... Bayou Rd. and Galvez.	8	20.158	3,160		6 30
Square 4. Esplanade, Decaturu, Frenchman.					
Creole Fire Co. No. 9			1,921		3 85
Square 9. Marigny, Mandeville, Decaturu, Pete s.					
Phœnix Fire Co. Engine	2	44.75	3,300		6 60
Square 160. Frenchmen, Elysian Fields, Dauphine, Royal.					
Washington Square		309.309	95 917		191 85
Square 161. Elys an Fields, Marigny, Royal, Dauphine.					
Recorder's Office and Police Station	6	36.131	4,710		9 40
Square 371. Spain, Mandeville, St. Claude, Rampart.					
City of New Orleans—					
DeSoto School ..... Mandeville	2	53 155	8,215		16 45
DeSoto School ..... Spain	14	53.155	8,215		16 45
Square 386. St. Anthony, St. Claude, Bazatelle and Marais.					
Fillmore School	15	64.128	8,192		16 40
Square 879.					
Independence Square		690.289	198,813		397 60
Square 1037. Onzaga, Lapeyrouse, Johnson, Galvez.					
City of New Orleans	10 lots 7	698.100	29,8 0		59 60
Square 2147. Mandeville, Spain, Humanity, Pleasure.					
City of New Orleans ..... Square			98,955		197 90
Square 2149.					
Union Square			189,000		378 00
Square 2844. Elysian Fields, Gently, Cato, Frenchm., Solon.					
Public School ..... Frenchmen and Solon	1	212.200	25,440		59 90
City of New Orleans—All the public streets from St. Peters at above to Lafayette ave. below from the River Mississippi to Lake Pontchartrain			102,513,396		$205,026 79

A true extract from the copy on file in the Civil District Court.
(Signed) DON GORDON, Dy. Clerk, Civil District Court.

I, Don Gordon, deputy clerk Civil District Court parish of Orleans, do certify that the first, second, third, fourth, as well as lines 1 to 5 on the fifth page of the foregoing pages, is a true and correct copy of the original on file, in clerk's office, Civil District Court, parish of Orleans; that page 5, from the 7th line thereof to the bottom of said page, together with the sixth, seventh, eighth, ninth and tenth pages are true and correct copies of a duly certified copy of the original thereof, this day exhibited to me, said certified copy being filed on the 24th day of August, 1883, in the United States Circuit Court, Eastern District of Louisiana, No. 10,337 of said court, the original being missing from the clerk's office of said Civil District Court; that no answer or opposition was filed by the city of New Orleans, in any of said proceedings, as appears from the dockets of said courts when said proceedings were had. And I further certify that the judgments set forth in the foregoing papers are final and executory, and the foregoing extracts from the assessment rolls, marked respectively "A," "B," "C," "D" and "E," for the Third Draining District, are true and correct extracts from the copy of assessment rolls filed in the foregoing matters, and referred to in the foregoing judgments homologating said assessment rolls.

(Seal) New Orleans, Dec. 15, 1886.

(Signed) DON GORDON,
Deputy Clerk Civil District Court.

Certificate of Recorder of Mortgages, referred to in foregoing petition, filed 16th April, 1872, pages 1, 2 and 3 of foregoing pages.

(Stamps)

Office Recorder of Mortgages, Parish of Orleans.

I hereby certify that on this 2nd day of March, 1872, Alfred Shaw, Administrator of Public Accounts of the city of New Orleans, has deposited in this office a plan by W. H. Bell, City Surveyor, of this date, said plan being said to comprise all the portion of the Third Drainage District lying in this parish. And also that he has deposited in this office five books comprising the subdivisions of the property included in said plan. Also a plan

of the canals intended to be dug and the place where the steam engines will be established.

(Signed) M. A. SOUTHWORTH,
Rec. Mort.

Endorsed—Recorder of Mortgages' receipt for Map and Tableaux of 3rd Draining District, March 2, 1872. Filed 16th April, 1872. Robert Lynne, Dy. Clerk.

State of Louisiana, Parish of Orleans, Clerk's Office, Civil District Court, parish of Orleans. I, Don Gordon, deputy clerk, Civil District Court parish of Orleans, do hereby certify that the foregoing page 15 is a true and correct copy of the original on file in the clerk's office of the Civil District Court of the parish of Orleans, in the above entitled matter, now No. 5608 of said Civil Dist. Court.

(Signed) DON GORDON,
Dy. Clerk.

Proof of Publication referred to in judgment homologating assessment rolls rendered on the 8th and signed on the 13th of November, 1872, and found at pages 9 and 10 of foregoing pages.

Eighth District Court, Parish of Orleans. No. 7482.

In the matter of the city of New Orleans, praying for a decree of mortgage and privilege, etc., upon the property of the Third Drainage District.

I hereby certify that no opposition to the homologation of the assessment roll filed herein, has been filed, and that the order of court has been duly published twice a week for thirty consecutive days in the official journal, the New Orleans *Republican*, notifying all persons to make opposition and to show cause, if any they had, why said roll should not be approved and homologated.

New Orleans, November 8th, 1872.

(Signed) ROBERT LYNNE,
(Seal) Dy. Clk. Eighth District Court.

Endorsed—7482. Clerk's certificate. Filed Nov. 8th, 1872. O. M. Tennison, Dy. Clk.

State of Louisiana, Parish of Orleans, Clerk's Office, Civil District Court, parish of Orleans, *ss.*

I, Don Gordon, deputy clerk of the Civil District Court of the parish of Orleans do hereby certify that the foregoing pages 15, 16 and 17 are true and correct copies of the original on file in the clerk's office of said Civil District Court, parish of Orleans in the above entitled matter and now numbered 5608 of said Civil District Court.

(Seal) (Signed) DON GORDON, Dy. Clerk.

Copy of Petition and Order for Revival of Judgment.

Civil District Court, Parish of Orleans, State of Louisiana. No. 5608.

In the matter of the city of New Orleans praying for a decree of mortgage privilege, etc. upon property in the Third Draining District.

To the Honorable the Judges of the Civil District Court, Parish of Orleans, Division A.:

The petition of the city of New Orleans a municipal corporation chartered and duly organized under the laws of the State of Louisiana, located in the parish of Orleans, in said State, and of the Board of Administrators of the said city, respectfully represent;

That heretofore, to-wit: on or about the 4th day of May, A. D. 1872, a judgment was duly rendered and signed, in the above entitled proceeding, by the Honorable the Judge of the late Eighth District Court of the parish of Orleans, State aforesaid, declaring all the property situate, lying and being in the Third Drainage District, subject to a first mortgage lien and privilege; and on or about the 8th day of November, 1872, a final judgment was duly rendered by the court aforesaid, and signed on the 13th day of said month homologating and approving the assessment roll of the Third Drainage District; and condemning the property owners named on the said roll to pay a personal judgment for such amount as shall have been placed opposite their names upon the said assessment roll; made under and in conformity to certain acts of the Gen-

eral Assembly of the State of Louisiana, in such case provided.

That for greater certainty petitioners respectfully refer to the aforesaid judgment and make the same a part of this petition together with the assessment roll of the Third Drainage District underlying the aforesaid judgment of homologation.

Petitioners further show that, in their opinion it is unnecessary to take proceedings for the revival of the judgments had and obtained as aforesaid; but to prevent the rights of all parties interested therein from being clouded over; and, out of an abundance of caution, your petitioners, without waiving or abandoning any privileges or rights conferred by the judgments aforesaid desire to supplement the same, by an order or decree of revival.

Wherefore, your petitioners pray that the several parties named or designated in the aforesaid tableau of assessments; and the owner or owners of all property referred to therein, whether such owners be known or unknown, by an order of this Honorable Court to be made and granted herein, may be cited and required to show cause within thirty days from the first publication of said order, if any they can, why the judgments aforesaid should not be regarded as being revived and possessing their original force and effect.

That an attorney *ad hoc* may be appointed by this Honorable Court to represent any and all of such defendants in the aforesaid judgments as may be absent and not represented; that the said attorney *ad hoc* may be cited to appear and answer this petition; that this cause may be otherwise proceeded in according to law and after due proceedings had the judgments aforesaid may be decreed to be revived and to have their original force and effect and that petitioner may have such other and further order, judgment and decree as may be suited to law and the nature of this case.

(Signed) C. F. BUCK,
City Attorney.
LACY & BUTLER,
Of Counsel.

Civil District Court, Parish of Orleans, Division. No. 5608.

In the matter of the city of New Orleans praying for a decree of mortgage privilege, etc., upon the property of the Third Drainage District.

Upon reading the foregoing petition, it is hereby ordered that the several parties named and designated in the tableau of assessments referred to in and homologated by a judgment of the Honorable the late Eighth District Court of the parish of Orleans, State of Louisiana, in the above entitled proceeding, rendered on the eighth day of November, 1872, and signed on the 13th day of the same month, do show cause, within thirty days after the first publication of this order, if any they have, why the said judgment of homologation and the preliminary judgment referred to in the petition should not be revived and held to possess their original force and effect.

It is further ordered that Meyer Gutheim, Esq., be and he is hereby appointed curator *ad hoc* to represent herein all such of the defendants in the aforesaid judgments as are absent and not represented; and that said curator *ad hoc* be cited and served with a copy of the petition for revival herein filed.

New Orleans, La., March 28th, 1882.

(Signed) A. L. TISSOT, Judge.

Endorsed—No. 5608. Civil District Court, parish of Orleans—Div. A. In the matter of the city of New Orleans praying for a decree of mortgage privilege etc., upon the property of the *Third Drainage District*. Petition for revival of preliminary judgment and judgment homologating assessment roll. C. F. Buck, City Attorney. Lacy & Butler, of Counsel. Filed March 18th, 1882 E. A. Luminais, Dy. Clk.

Endorsed—No. 5608. Civil District Court. In the matter of the Board of Commissioners Third Draining District.—Copies of petitions praying judgments, decreeing mortgage lien and privilege and homologating assessment roll with extracts from rolls showing amt. of judgments against city of New Orleans. $207,441.46. (Written in red ink) Exhibit D and "Homologation 4."

Exhibit "E."

Proceedings in matter of Board of Administrators praying for recognition of mortgage and recovery of assessments in Fourth Draining District—Administrators acting under Act 30 of 1871—rendered by Superior District Court, parish of Orleans in No. 807 on docket of said court, on 29th day of January, 1873, and signed on the 3rd day of February, 1873.

Filed with and made part of bill, November 26, 1894.
(Stamps)

To the Hon. Jacob Hawkins, Judge of the Superior District Court of the Parish of Orleans.

The petition of the city of New Orleans, a municipal corporation chartered by the laws of the State of Louisiana and domiciliated in the parish of Orleans, State aforesaid, and of the Board of Administrators of said city, herein appearing, jointly and severally with the said city,

Respectfully represents:

That heretofore, to wit: on or about the 18th day of March, 1858, the Legislature of Louisiana, with a view to drain and reclaim the parishes of Orleans and Jefferson, passed an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson." and in and by the said act created and established these draining districts known and designated as the First, Second and Third Draining Districts; as will more fully and at large appear from the act aforesaid, to which for greater certainty your petitioners respectfully refer.

Further, they show that by an amendatory statute of the General Assembly aforesaid, approved on the 17th day of March, A. D. 1859, the several boards of commissioners provided for by the act passed in the preceding year, among other things, were authorized and required to fix and determine the amount of assessment to be levied upon the superficial, or square, foot of land, situated within the draining district, as will more fully and at large appear from the aforesaid act, and to which your petitioners respectfully refer your Honor.

Further they show, that in the year 1871, the General Assembly of Louisiana, adopted Act No. 30, entitled

"An act to provide for the drainage of New Orleans;" and therein and thereby, and with a view to raise funds for the payment of the work therein contemplated to be done by the Mississippi Mexican Gulf Ship Canal Company, the Board of Administrators of New Orleans were subrogated to all the rights, powers and facilities enjoyed by the aforesaid commissioners of the several draining districts, and of every corporation, if any there were charged with the duty of draining and leveeing within the limits of the cities of New Orleans and Carrollton.

Further they show, that in and by the act last referred to, the Board of Administrators aforesaid, was fully empowered to establish a draining district additional to those created by the act of March 18, 1858, and March 17th, 1859; and were authorized and required to make an assessment of two mills per superficial foot, on those parts of the original draining districts, and on such other lands as might be brought within the protection levees contemplated by the aforesaid Act No. 30, where no assessments have been made; as will more fully appear from Act No. 30 aforesaid and to which, for greater certainty, your petitioners refer.

Further, they show that by an ordinance of the City Council of the city of New Orleans, adopted February 6th, 1872, and known and designated as No. 1359, A. S., the Fourth Drainage District was established with the following limits or boundaries, viz.:

Commencing on the left bank of the river Mississippi, at the point of intersection with Lafayette avenue, thence continuing down the said river to the point of intersection with Fishermen's canal, thence running back from the said river, a distance of 9,900 feet, or thereabouts, to Bayou Bienvenue and Florida Walk; thence continuing along Florida Walk, for a distance of 15,914 feet or thereabouts, so as to connect, through a curved line of 338 feet additional, with Lafayette and People's avenue, at a point distant from the Mississippi river of 9,600 feet, or thereabouts; and thence along Lafayette avenue to the place of beginning.

That your petitioners, being prepared to drain the sec-

tion or district hereinabove particularly set forth and bounded, provided certain books and plans of the said section or district, therein accurately designating the limits of the district, and showing, as far as possible, the subdivision of the property therein contained the names of the proprietors, the dimensions and directions of the canals intended to be dug, and the place where the steam engine will be established; and, on the 12th day of November, 1872, your petitioners deposited the aforesaid books and plans with the Recorder of Mortgages, of the parish of Orleans, as will more fully appear from the receipt of such officer hereunto annexed and made a part hereof.

Further, they show that after the deposit aforesaid, your petitioner caused notices to be inserted, in French and English, in two newspapers published in the city of New Orleans at least once a week, during four weeks in succession, announcing that petitioners would proceed to drain the fourth section, or district, aforesaid, designating the place where the plan thereof was deposited, and indicating as near as possible, the time within which the draining of said district would be completed, and the probable cost of the work; as will more fully appear from the notices and papers aforesaid, filed herewith and made a part hereof.

Further your petitioners show unto your that by an ordinance of the City Council adopted November 19, 1872, known as No. 1877 an assessment of two mills per superficial foot, in accordance with the authorization and requirement of the statute of the State of Louisiana, was levied and imposed upon all the lands comprised within the Fourth Drainage District aforesaid, as will more fully appear from a certified copy of such ordinance hereto annexed and made a part hereof.

The premises considered your petitioners pray for a decree from this Honorable Court, subjecting each portion of the property situated within the limits of the 4th Draining District or section aforesaid, to a mortgage lien and privilege in favor of your petitioners for the objects and purposes contemplated and prescribed by law, particularly by Act No. 30 of the State of Louisiana passed in the year 1871 for such amounts as is, or may be

assessed, upon such property for its proportion of the costs of draining such district, or section, in accordance with the provisions of the statute or statutes, by or under, which said privilege, lien and mortgage are recognized authorized or created; and interest thereon at the rate of six per cent. per annum, from demand thereof, together with all costs; and such other and general relief as the nature of the case, and the law, may require.

(Signed) GEO. S. LACEY, Attorney.

Superior District Court, Parish of Orleans. No. 807.

In the matter of Board of Administrators, praying for recognition of mortgage and recovery of assessments in 4th Drainage District.

On motion of George S. Lacey, attorney for the Board of Administrators of this city of New Orleans, and for said city, acting herein for the purposes and objects provided by law, particularly Act No. 30 of the General Assembly of Louisiana passed in the year 1871, and upon dne proof of the facts and allegations set forth and contained in the petition filed herein, more particularly the publication of notice in two public newspapers for the time and in the manner required by law and the law and evidence authorizing the same.

It is ordered, adjudged and decreed that each portion of the property situate in the Fourth Draining District, bounded and described as follows: Commencing on the left bank of the river Mississippi, at the point of intersection with Lafayette avenue, thence continuing down the said river to the point of intersection with Fishermen's canal, thence running back from the said river a distance of 9900 feet, or thereabouts, to Bayou Bienvenue and Florida Walk for a distance of 15,914 feet, or thereabouts, so as to connect through a curved line of 338 feet additional, with Lafayette and People's avenue at a point distant from the Mississippi river of 9600 feet, or thereabouts; and thence along Lafayette avenue to the place of beginning, be, and the same is hereby subject to a first mortgage, lien and privilege in favor of petitioners, the city of New Orleans and the Board of

Administrators of said city, for such amount as is or may be assessed upon said property for its proportion of the whole costs and expenses of draining the aforesaid district in accordance with the law, and particularly Act No. 30 above referred to in such case made and provided, creating and continuing said first mortgage, lien and privilege with interest thereon at six per cent. per annum from demand thereof.

Rendered January 29th, 1873.
Signed February 3d, 1893.

(Signed) JACOB HAWKINS, Judge.

Office of Recorder of Mortgages, Parish of Orleans.

I hereby certify that on this 12th day of November, 1872, Alfred Shaw, Administrator of Public Accounts of the city of New Orleans has deposited in this office a plan by W. H. Bell, city surveyor of this date, said plan being said to comprise all the portion of the Fourth Draining District lying in this parish. And also that he has deposited in this office two books said to comprise the subdivisions of the property included in said plan.

Also a plan of the canals intended to be dug, and the place where the steam engines will be established.

(Signed) M. A. SOUTHWORTH,
Rcd. Mort.

"Duplicate."

N. Orleans, Nov. 12, 1872.

Recd. of the city of New Orleans, $20, for the deposit of drainage plans and the evidence of the decree thereof.

(Signed) M. A. SOUTHWORTH,
Rcd. Mort.

"Duplicate."
A true copy. New Orleans, March 29th, 1888.
(Seal) (Signed) M. A. McDONNELL, Dy. Clk.

Endorsed—No. 6099. Third District Court. In the matter of the Board of Administrators praying for recognition of mortgage and recovery of assessments in 4th Drainage District.

Exhibit "Homologation 5."

Superior District Court, Parish of Orleans. No. 807.

In the matter of the Board of Administrators praying for recognition of mortgages and recovery of assessments. Petition to homologate, etc. Affidavit.

GEO. S. LACEY, Atty.

Filed February 7, 1873.

(Signed) O. M. TENISON, Dy. Clk.

To the Honorable Jacob Hawkins, Judge of the Superior District Court of the Parish of Orleans:

The petition of the city of New Orleans, a municipal corporation, chartered by the laws of the State of Louisiana, and domiciliated in the parish of Orleans State aforesaid, and of the Board of Administrators of said city, herein appearing jointly and severally with the said city, respectfully represents:

That heretofore, to-wit: on or about the 18th day of March, 1858, the Legislature of Louisiana, with a view to drain and reclaim the parishes of Orleans and Jefferson, passed an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," and in and by the said act created and established three draining districts known and designated as the First, Second and Third Draining District; as will more fully and at large appear from the act aforesaid, to which for greater certainty your petitioners respectfully refer.

Further, they show that by an amendatory statute of the General Assembly aforesaid, approved on the 17th day of March, A. D. 1859, the several boards of commissioners provided for by the act passed in the preceding year, among other things were authorized and required to fix and determine the amount of assessment to be levied upon the superficial or square foot of land, situated within the draining district or section of such board or boards; as will more fully and at large appear from the aforesaid act, and to which your petitioners respectfully refer your Honor.

Further, they show that in the year 1871 the General Assembly of Louisiana adopted Act No. 30 entitled "An

act to provide for the drainage of New Orleans," and therein, and thereby, and with a view to raise funds for the payment of the work therein contemplated to be done by the Mississippi and Mexican Gulf Ship Canal Company the Board of Administrators of New Orleans were subrogated to all the rights, powers and facilities enjoyed by the aforesaid commissioners of the several draining districts, and of every corporation, if any there were, charged with the duty of draining and leveeing within the limits of the cities of New Orleans and Carrollton.

Further they show that in any and by the act last referred to the board of administrators aforesaid was fully empowered to establish a draining district additional to those created by the act of March 18, 1858, and March 17, 1859; and were authorized and required to make an assessment of two mills per superficial foot, on those parts of the original draining districts, and on such other lands as might be brought within the protection levees contemplated by the aforesaid Act No. 30, where no assessments have been made, as will more fully appear from Act No. 30 aforesaid, and to which, for greater certainty, your petitioners refer.

Further, they show that by an ordinance of the City Council of the city of New Orleans, adopted February 6, 1872, and known and designated as No. 1359, A. S., the Fourth Drainage District was established with the following limits or boundaries, viz.:

Commencing on the left bank of the river Mississippi at the point of intersection with Lafayette avenue; thence continuing down the said river to the point of intersection with Fisherman's canal; thence running back from the said river a distance of 9900 feet, or thereabouts, to Bayou Bienvenue and Florida Walk, for a distance of 15,914 feet or thereabouts, so as to connect, through a curved line of 338 feet additional, with Lafayette and People's avenue, at a point distant from the Mississippi river of 9600 feet or thereabouts and thence along Lafayette avenue to the place of beginning.

That your petitioners, being prepared to drain the section or district hereinabove particularly set forth and bounded, provided certain books and plans of the said section or district, therein accurately designating the

limits of the district, and showing, as far as possible, the subdivision of the property therein contained, the names of the proprietors, the dimensions and the directions of the canals intended to be dug, and the place where the steam engine will be established; and, on the 12th day of November, 1872, your petitioners deposited the aforesaid books and plans with the Recorder of Mortgages, of the parish of Orleans, as will more fully appear from the receipt of such officer, hereunto annexed and made part hereof.

Further, they show that after the deposit aforesaid, your petitioners caused notices to be inserted, in French and English, in two newspapers published in the city of New Orleans, at least once a week, during four weeks in succession, announcing that petitioners would proceed to drain the fourth section, or district aforesaid, designating the place where the plan thereof was deposited, and indicating, as near as possible, the time within which the draining of the said district would be completed, and the probable cost of the work; as will more fully appear from the notices and papers aforesaid, filed herewith and made a part hereof.

Further, your petitioners show unto your Honor, that by an ordinance of the City Council adopted November 19th, 1872, known as No. 1877, an assessment of two mills per superficial foot, in accordance with the authorization and requirement of the statute of the State of Louisiana, was levied and imposed upon all the lands comprised within the Fourth Drainage District aforesaid, as will more fully appear from a certified copy of such ordinance, hereto annexed and made a part hereof.

And your petitioner further show unto your Honor, that they have made and completed a tableaux of assessment of property lying within the Fourth Drainage District, or section aforesaid, and therein have set forth the property described, together with the amount of tax imposed, also the names of the owners of such property, when known and when not known, a statement that the property assessed belongs to owners unknown; and have caused notice of the completion of such tableaux, and the filing of the same in the office of the Recorder of Mortgages of the parish of Orleans, and in the office of the clerk of

this Honorable Court, and also in the office of the Administrator of Public Accounts of the city of New Orleans, to be given by publication in the English and French languages, in the New Orleans *Bee* and *Republican* for the time required by law—a copy of which notice is hereto annexed and made a part hereof.

The premises considered, your petitioners pray for an order requiring all persons, whom it may concern, to show cause, within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved, homologated and made the judgment of the court. That in due course of law, the said tableaux may be homologated and approved; and that judgment be rendered for the amount set forth in the assessment roll, together with interest at the rate of six per cent. per annum from the time of demanding payment of the amount assessed, and also ten per cent. in additional to the amount awarded, with interest to be paid to the attorney of petitioners, for counsel fees herein, and that such other and further order, judgment and decree may be entered as is suited to law and the nature of the case.

(Signed) GEO. S. LACEY, Attorney.

Superior District Court, Parish of Orleans. No. 807.

In the matter of Board of Administrators praying for a recognition of mortgage and recovery of assessments in Fourth Drainage District.

Geo. S. Lacey, attorney for petitioners, being duly sworn doth depose and say; that the tableaux of assessments referred to in the foregoing petition having been completed, notice of such completion and the filing of said tableaux in the office of the Recorder of Mortgages of the parish of Orleans, and in the office of the Clerk of the Superior District Court, and also in the office of the Administrator of Public Accounts of the city of New Orleans, was given by publication in the French and English languages, in the New Orleans *Republican* and New Orleans *Bee* public newspapers published in the city of New Orleans, on the 30th and 31st days of January and on the 1st, 2d, 3rd, 4th, 5th, 6th, 7th days of February A. D. 1873, as will more fully appear from copies of said news-

papers filed with this affidavit and with the petition to which the same is attached.

(Signed) GEO. S. LACEY.

Sworn to and subscribed before me this 7th day of February A. D. 1873.

(Signed) O. M. TENISON, Dy. Clerk.

Superior District Court, Parish of Orleans. No. 807.

In the matter of the Board of Administrators praying for recognition of mortgage and recovery of assessments in 4th Drainage District.

On motion of Geo. S. Lacey, attorney and upon filing and accompanying affidavit together with New Orleans *Republican* and New Orleans *Bee*, It is ordered that all persons whom it may concern, show cause within thirty days from the first publication of this order, if any they have, why the assessment roll of the property lying within the Fourth Drainage District of the city of New Orleans, comprised within the following limits, viz: Commencing on the left bank of the Mississippi river, at the point of intersection with Lafayette avenue, thence continuing down the said river to the point of intersection with Fisherman's canal thence running back from the river a distance of 9,900 feet or thereabouts, to Bayou Bienvenu and Florida Walk; thence continuing along Florida Walk for a distance of 15914 feet or thereabouts, so as to connect through a curved line of 338 feet additional, with Lafayette and People's avenue, at a point distant from the Mississippi river of 9600 feet or thereabouts; and thence along Lafayette avenue to the place of beginning, should not be approved and homologated, and judgment of the court be rendered in manner and form as prayed for in the petition on file.

Dated New Orleans, February 10th A. D. 1873.

(Signed) JACOB HAWKINS, Judge.

Clerk's Office, Supr. District Court,
New Orleans, October 19, 1874.

I hereby certify that the foregoing petition, affidavit and order, to be true copies of the original filed, in the matter of the 4th Drainage District, No. 807 of the docket of this court.

(Signed) JOHN BURKE, Clerk.

State of Louisiana, Superior District Court for the Parish of Orleans.

To city of New Orleans, all the streets from Lafayette avenue to lower parish line, from the Mississippi river to Florida avenue.

I hereby certify, That on the 15th day of March, 1873, judgment was rendered in this court, in the following entitled suit, viz.:

Supr. Dist. Court, Parish of Orleans. No. 807.

In the matter of the Board of Administrators praying for recognition of mortgage and recovery of assessments in the 4th Drainage District.

Homologating the tableaux of assessments and condemning you to pay the sum of sixty-five thousand nine hundred and fifty-six dollars and seventy-five cents, with six per cent. per annum interest thereon, from the 29th day of January, A. D. 1873, until paid; also ten per cent. upon the amount aforesaid for attorneys fees and costs of suit; with a decree of mortgage, and lien and privilege upon certain property belonging to city of New Orleans and described and designated on said tableaux for the payment of the amount herein above set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans on this 21st day of March, in the year of our Lord one thousand eight hundred and seventy-three, and the ninety-seventh year of the independence of the United States.

(Signed) J. BURKE, Clerk.

Received May 30, 1873 and on the thirty-first day of the same month and year, served copy of the within judgment on the city of New Orleans, defendant herein, by leaving same at the office of the Hon. Louis A. Wiltz, mayor of said city in the City Hall, corner St. Charles and Lafayette streets in the hands of E. W. Halsey his secretary, who informed me that the mayor was absent from his office, at the time of said service.

Returned same day.

Sheriff's fee $-.50.

(Signed) B. N. LACOSTE, Dy. Sheriff.

A true copy:

(Signed) J. J. HANNON, Dy. Clerk.

State of Louisiana, Superior District Court for the Parish of Orleans.

I hereby certify, That on the 15th day of March, 1873, judgment was rendered in this court in the following entitled suit in the words and figures following, to-wit:

Supr. Dist. Court, Parish of Orleans. No. 807.

In the matter of the Board of Administrators praying for a recognition of mortgages and recovery of assessments in the 4th Drainage District.

This cause was duly taken up for the purpose of homologating the tableaux of assessments, filed herein, on the twenty-ninth day of January A. D. 1873, as far as not opposed, viz: by Widow Lesseps, Albin Soulé, Bernard Soulé, heirs of Norbert Soulé and Frank N. Butler, attorney *ad hoc*. Present Geo. S. Lacey, attorney for Board of Administrators, etc.

When after hearing evidence and the arguments of counsel and the law and evidence authorizing the same,

It is hereby ordered, adjudged and decreed, that the assessment rolls or tableaux aforesaid, embracing the property lying within the Fourth Drainage District of the city of New Orleans comprised within the following limits, viz: commencing on the left bank of the river Mississippi at a point of intersection with Lafayette avenue, thence continuing down said river to the point of intersection with Fisherman's canal, thence running back from the said river a distance of 9900 feet or thereabouts, to Bayou Bienvenu and Florida Walk, for a distance 15,914 feet or thereabouts, so as to connect through a curved line of 338 feet additional with Lafayette and People's avenue, at a point distant from the Mississippi river of 9600 feet or thereabouts, and thence along Lafayette avenue to the place of beginning," be and the same is hereby homologated and approved and in addition thereto, judgment is now rendered in favor of the city of New Orleans and the Board of Administrators of said city jointly and severally for account of the several parties, and for the uses and purposes designated and provided for by law and against the several pieces of property set forth or described in such tableaux or assessment roll, and the respective owners thereof,

known and unknown, for the amount or amounts therein set forth against said property or the owners thereof, together with interest at the rate of six per cent. per annum from the 30th day of Jauuary A. D. 1873, and also ten per cent. upon and in addition to the amount above allowed for principal and interest, as fees for the attorney herein named, together with such costs as may have accrued or may hereafter accrue in the prosecution of these proceedings.

And it is further ordered, adjudged and decreed, that the mortgage and lien hereafter declared by an order or judgment of this court, be and the same is hereby recognized and confirmed; and the city of New Orleans and the Board of Administrators, for the uses and purposes required by law, and any and all parties having an interest in this judgment, as therein set forth, are hereby declared to have a mortgage and lien on the several pieces of property mentioned and described in the assessment roll or tableaux, herein referred and homologated for the payment and satisfaction of this judgment, principal and interest, attorney's commission and costs.

Judgment signed 20th day of March A. D. 1873.

(Signed) JACOB HAWKINS, Judge.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at the city of New Orleans, on this 21st day of October, in the year of our Lord, one thousand eight hundred and seventy-four, and the ninety-eighth year of the independence of the United States.

(Signed) J. J. HANNON, Dy. Clerk.

Extract from Tableaux.

Endorsed on foregoing judgment.

Bill.	Name, Owner.	Property.
3048	City of New Orleans.	All streets from Lafayette avenue to lower parish line, and from the River Mississippi to Florida avenue.

Amount of drainage tax, $65,956.75; 10 per cent., $6595.75 and interest.

Clerk's Office, Superior District Court,
New Orleans, October 21st, A. D., 1874.

Superior Dist. Court, Parish of Orleans. No. 807.

In the matter of the Board of Administrators applying for a recognition of mortgages and payment of assessments of the Fourth Drainage District.

I hereby certify that in the above entitled matter, no answer or opposition to the homologation of the tableaux of assessments was filed by the city of New Orleans; that the city of New Orleans prayed for such homologation, and that the judgment of homologation rendered on the 15th day of March A. D., 1873, and signed on the 20th day of March A. D., 1873, is final and executory.

In witness whereof I have hereunto affixed my official signature and the seal of the said court at the city of New Orleans, this 21st day of October, A. D. 1874.

(Signed) J. J. HANNON, Dy. Clerk.

Comptroller's Office,
New Orleans, December 4, 1886.

I hereby certify the foregoing to be true and correct copies of the transcript in the above entitled and numbered cause as registered in this office, November 5th, 1874, in book 2, folios 74 to 87 inclusive.

(Signed) E. S. WILLIAMS,
Legal Process Clk.

Endorsed—No. 807. Superior District Court. In the matter of the Board Administrators of the city of New Orleans, etc. *Fourth* Draining Dist. Copies of petitions praying judgment, decreeing mortgage lien and privilege, and homologating assessment rolls, with extracts from rolls showing amt. of judgment due by city of New Orleans. $65,956.77. Exhibit "E" and "Homologation 5."

"*Inventory 1.*"

Copy of the inventory of the effects of the Miss. & Mexican Gulf Ship Canal Co. transferred to the city of New Orleans, as on file in the office of the city surveyor.

Filed with and made part of bill Nov. 26, 1894.

CITY SURVEYOR'S OFFICE,
Room 19, City Hall, May 1, 1876.

To the Hon. Mayor and Administrators of the City of New Orleans:

In conformity with instructions conveyed in an ordinance recently adopted by the City Council, I have made a careful and thorough examination of the property mentioned and represented by W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, and herewith have the honor to submit a report showing the condition and approximate value of the same, together with such other information as I have been directed to furnish under the requirements of said ordinance. The property examined consists of:

7 Dredge boats.
11 Derricks.
1 Steam tug.
1 Barge for floating derricks.
1 Floating boarding house.
1 Lot of buildings at Halfway House.
1 Assortment of large and small castings, etc., for dredge boat machinery.

DREDGE BOAT NO. 1.

Dredge boat No. 1 is now lying in Upper Line Protection Levee Canal, near Carrollton, and has not been provided with work for over five months.

It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards at each lift, and the average capacity for excavating per month is 12,500 cubic yards. The hull is six years old, and shows a little leakiness near foot of iron mast, but is still in serviceable condition, and the engine, boiler and other machinery is in good working order. The boat has an upper deck, with serviceable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order.

The machinery of the derrick accompanying this boat is now stored upon the deck of the dredge, the frame having rotted and been abandoned.

The machinery, however, is in good order and would be ready for service as soon as a new frame could be con-

structed. The original cost of the dredge was $25,000, and the derrick $5000.

DREDGE BOAT NO. 3.

Dredge boat is now actively at work in excavating the Lower Line Protection Levee Canal at a point about one mile south and east of its intersection with the Mobile Railroad. It is 70 ft. in length and 30 ft. in width. The capacity of dipper is 1¼ cubic yards to the lift and the average capacity for excavating is about 12,500 cubic yards per month. The hull is six years old, with but slight apparent leaks, and has been recently repaired, with a new floor on lower deck. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. This boat has been constantly at work and has suffered no delay except for a short period when difficulties were encountered in crossing the track of the Mobile Railroad. The machinery is all in good, and serviceable working order, as well as that of the derrick accompanying it. The original cost of the dredge was $25,000, and the derrick $5000.

DREDGE BOAT NO. 2.

Dredge boat No. 2 is now engaged in following boat No. 3 in deepening the Lower Line Canal, and is now located near the crossing of the Mobile Railroad. The length is 70 ft. and the width 30 ft. The capacity of dipper is 1¼ cubic yards to the lift and average capacity per month 12,500 cubic yards.

The hull is six years old, showing no leaks and in good working condition; it has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The boat has been laid up for several months, a portion of the time undergoing repairs, and only recently resumed work in deepening the canal, behing boat No. 3. The entire machinery of the boat, together with that of the accompanying derricks, is in good order and capable of doing effective work. The original cost of the dredge was $25,000 and the derrick $5000.

DREDGE BOAT NO. 4.

Dredge boat No. 4 is now lying alongside of boat No. 1, in Upper Line Protection Levee Canal, near Carrollton, and has not been provided with work for more than five month. It is 70 feet long and 30 feet wide. The capacity of dipper is 1¼ cubic yards and the average capacity for dredging about 12,500 cubic yards per month. The hull is six years old, presents no signs of leaking, and the whole in serviceable order. It has an upper deck with suitable sleeping and boarding accommodations for a full complement of mechanics and laborers, and all in good order. The derrick accompanying this boat had a new frame built about eighteen months ago, and the machinery, together with that of the main boat, is in good order and ready for any work to which it may be assigned. The original cost of the dredge was $25,000 and the derrick $5000.

DREDGE BOAT J. O. NOYES.

The dredge boat J. O. Noyes is located at the same point in Upper Line Canal with boats Nos. 1 and 4, and has been idle for four months.

It is 62 ft. long and 19 ft. wide. The capacity of dipper is one cubic yard, and average capacity of boat for dredging work about 6000 cubic yards per month.

The hull is three years old, perfectly sound and free of leaks, and has an upper deck with suitable accommodations for all workmen. The machinery is in good order, and the boat is ready for active service. The original cost of the dredge was $25,000.

DREDGE BOAT CLAM SHELL.

The Clam Shell is now lying at the —— Lower Line Canal adjacent to the Gentilly Ridge road crossing, and has been idle for several months. It is 65 ft. long and 30 feet wide, the hull is 6 years old, and shows a few leaks, but nothing serious. The boat was constructed under a patent for a new dipper, and other royalty appliances, and is therefore the most costly of all the boats. The dipper resembles a clam sheel from which the boat derives its name, and is capable of performing an immense amount of work, in cleaning and deepening old canals, or

taking out the border cuttings of a new canal. The capacity of the boat is about 15,000 cubic yards per month, when provided wlth suitable work or soft digging. The machinery is in good order and condition and the boat ready for active service. It has also an upper deck provided with suitable accommodations for all mechanics and laborers and everything about it in fair condition. The original cost of the boat and outfit was $40,000.

DREDGE CALLED RIDGE BOAT.

The Ridge Boat is now lying in the London Avenue Canal, or Tail-race near the London Avenue Draining Machine, and has been idle for four months. It is 83 ft. in length and 30 feet in width. The capacity of dipper is one cubic yard and average capacity for excavating per month 6000 cubic yards. The boat was purchased from the city by the Canal Company, and a new hull built about five years ago. It was furnished with a new boiler and water pumps, and the entire machinery and hull is now in good and serviceable working order. It has like all the others an upper deck, etc. The cost of the dredge including the new hull, etc., was $18,000.

STEAM TUG.

The steam tug is used as a transport for conveying pieces of machinery and supplies from the central depot at Halfway House to the different boats when required. It is several years old, and when new cost about $2000. It is in serviceable order.

BARGE FOR FLOATING DERRICKS.

The barge for floating derricks is now lying with the boats tied up in the Upper Line Canal, and is 60 feet long and 31 feet wide. The hull is in good order, and no leakage visible. The original cost was about $1000.

FLOATING BOARDING HOUSE.

The floating boarding house is 28 feet in length and 14 feet wide. It contains a stove, cook room, store room, with sleeping berths and dining hall and has a good shingle roof. The hull is in good condition, with no apparent leaks. It cost to build about $500.

BUILDINGS AT HALFWAY HOUSE.

These buildings are located on the east bank of the new canal, opposite the Halfway House, and serve as a central depot for the distribution of machinery and supplies and for making repairs. They consist of a frame house used as a store room and office. One blacksmith shop with tools and appurtenances, a carpenters' shed and outbuildings and cisterns, etc.

The ground upon which they are built was leased from the "Fireman's Charitable Association," but the lease is about expiring and will have to be renewed or the buildings removed. The original cost of improvements was about $1500.

ASSORTMENT OF CASTINGS, ETC.

This assortment comprises various castings both large and small as duplicates to the different parts of the dredge boat machinery and they are all stored at the central depot near the Halfway House. Some of the principal pieces are, viz:

1 heavy cast iron main mast.
2 " " top masts.
Hoisting and swinging drums.

Duplicate cog wheels various sizes. A quantity of small castings representing duplicates for almost every part of the machinery in use. The original cost of this assortment of iron work was about $5000.

VALUATION.

In estimating the value of the property above enunciated and especially that of the dredge boats, I have been confronted with grave difficulties in determining exactly how the valuation should be made.

A dredge boat is something which really has no true market value at all times corresponding with its actual cost, therefore, it can only be deemed valuable in proportion to the amount of profitable work it may have the prospect of executing in a fixed period of time. In the hands of the present owner who has by law a specific and valuable contract to execute, or in the contemplated possession and use by the city, the dredge boats would cer-

tainly possess a positive usefulness and consequently have some fixed or definite value. Governed by this view of the case the conclusion has been reached that it would be just and equitable to make a valuation on the basis of the actual or original cost of the property, but with a deduction of 25 per cent. as an offset for wear and tear from use and deterioration by age.

The following result has therefore been attained and is respectfully submitted:

Dredge boat No. 1, original cost	$25,000
" " " 2, " "	25,000
" " " 3, " "	25,000
" " " 4, " "	25,000
Dredge boat "J. C. Noyes," original cost	17,000
" " "Clam Shell," " "	40,000
Total	$157,000
Dredge boat, Ridge Boat, original cost	$18,000
Derrick of No. 1, original cost	5,000
" " " 2, " "	5,000
" " " 3, " "	5,000
" " " 4, " "	5,000
Steam tug, original cost	2,000
Floating boarding house, original cost	500
Buildings at Halfway House, original cost	1,500
Floating barge for derrick, " "	1,000
Various castings, etc., for machinery, original cost	5,000
Making a total of	$205,000
Less 25 per cent	51,250
Leaving a balance for valuation of entire property	$153,750

DAMAGES CLAIMED.

The damages claimed by the transferee are for delays at various times and places and are enumerated according to the statement as follows, viz.:

Delay on Lake Shore Protection Levee (1872) 80,000 cubic yards. Delay in crossing Jackson R. R. (1873)

24,000 cu. yds. Delay in crossing Mobile R. R. (1875) 68,000 cu. yds. dredge boats idle not supplied with work (1875 and 1876) 190,000 cu. yds. making a total of 362,000 cu. yds.

It is claimed by the transferee that without the delays above enumerated he boats would have executed and he would have examined on estimate of 362,000 cubic yards in excess of what has been returned from this office, and that the estimate is made in cubic yards for the purpose of determining by an allowance of what the work would have cost, what the probable profits would have been, and consequently the damages sustained. From an examination made of the records in this office, and from personal knowledge of the facts of the situation, I am of the opinion that the claim presented is excessive and is susceptible of very considerable deduction. A communication has been found in the letter book under date of Aug. 15th, 1872, from Wm. H. Bell, city surveyor to J. C. Noyes, notifying him by directions of the Administrators of Improvements, not to commence excavations for Lake Levee until a certain price of planking and timber work adjacent was completed. It is claimed that this notification delayed the boats which were then ready to commence work and that the delay was equivalent to the performance of 80,000 cubic yards of embankment—but I can find nothing further in the records to show exactly how many days the boats were idle on consequence of this notification, and, therefore, I am not prepared to recognize any specific amount for this claim.

The delay in crossing Jackson railroad may be a just claim, but there are no records in this office showing any negligence or unnecessary action on the part of the city authorities, or of the railroad company in hindering the prosecution of the work, and I am not prepared in this case either to admit or dispute the claim until competent evidence is produced to establish it.

The claim for damages in crossing the Mobile R. R. can not be justly established, as by a compromise effected between the city, the railroad company and the transferee, the question of damages was adjusted beforehand, and allowances made in drainage warrants to the transferee for that purpose.

The item of 190,000 cubic yards for delays in boats not being supplied with work during the latter months of 1875 and up to the present time of 1876, is subject to certain modifications from statements and explanations hereinafter to be made.

The boats that have been idle up to the 1st May inst. are, viz.:

Boat No. 1	5½	months.
" " 4	5½	"
" J. C. Noyes	4	"
" Ridge Boat	4	"
" Clam Shell	4	"

Of the above boats the only ones entitled to a consideration for damages are No. "1," "4" and the "Clam Shell." These boats finished the interior work they were engaged upon last November, and were ready to proceed with the excavations for the Lake Shore revetment levee, but were prevented from so doing by the refusal of the city authorities to allow the city surveyor to furnish the necessary lines and levels.

The J. O. Noyes was withdrawn from the Nashville avenue canal and tied up without the knowledge or consent of this department, and therefore is entitled to no consideration or damages for her idleness.

The Ridge Boat also is entitled to no consideration, as work was provided for it, but not accepted. The only boats therefore for which an assessment for damages can be entertained are No. 1, No. 4 and the Clam Shell; and I have deemed that the most equitable way to arrive at a conclusion is to make an abstract from the records of what these several boats earned in a certain period immediately anterior to being stopped, and accept this as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of their delay:

						c. yds.
Boat No. 1,	5½	months, at	12,720	yds.	per month	69,960
" No. 4,	5½	" "	12,350	"	"	67,925
" Clam Shell,	4	" "	2,890	"	"	11,560
Making a total of						149,445 cubic yards.

As far as the actual damages are concerned in money, I am not able to arrive at a conclusion and do not feel

myself called upon to express an opinion. But with the facts before you and the suggestions which have been made, there will no doubt be sufficient data for the committee to be enabled to arrive at something like a just and satisfactory conclusion in the premises.

Respectfully submitted,

(Signed) THOMAS S. HARDEE,
City Surveyor.

"*Transfer 1.*"

Mexican Gulf Ship Canal Co. and W. Van Norden, Transferee to the City of New Orleans.

Filed with and made part of bill, Nov. 26, 1894.

N. O., 7th June, 1876. Sale of franchises. No. Miss. & Mex. Gulf Ship Canal Co. and W. Van Norden, transferee and individually to the city of New Orleans.

United States of America, State of Louisiana, Parish of Orleans, City of New Orleans.

Be it known, that on this seventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the independence of the United States of America the one-hundredth, before me, Gustave LeGardeur, Jr. a notary public, duly commissioned and sworn, in and for this city and parish aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared:

1. The Honorable Charles J. Leeds, mayor of the city of New Orleans, and herein duly authorized as such, under, and by virtue of Ordinances Nos. 3479 and 3539, Administration Series, adopted by the council of the city of New Orleans, respectively, on the 25th day of April and 23d day of May, 1876, and herein furthermore fully authorized under and by virtue ot the provisions of Act No. 16 of acts of 1876, approved February 24, 1876.

2. Messrs. John Mathers, Jr., and Samuel D. Moody, both of this city, and herein acting, the former as president, and the latter as secretary, of the Mississippi & Mexican Gulf Ship Canal Company, a duly authorized

corporate body of this State, domiciled in this city, and herein acting in their said capacities, under and by virtue of a resolution of the Board of Directors of the said Mississippi & Mexican Gulf Canal Company, adopted at their sitting of the 3d day of June, 1876, a duly certified copy of which said resolution is hereto annexed for reference.

3. And Warner Van Norden, Esquire, also of this city, herein acting in his own name, individually, and also as transferee and pledgee of the said Mississippi & Mexican Gulf Ship Canal Company, under and by virtue of an act passed before Andrew Hero, Jr., a notary public, in this city, on the 22d day of May, 1872.

And the said Mississippi and Mexican Gulf Ship Canal Co., through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee of the said company, by virtue of the afore recited act of the 22d of May, 1872, before the said A. Hero, Jr., notary, declared that for the consideration and on the terms and conditions herein set forth, they do, by these presents, grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for, and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said Ordinances Nos. 3479 and 3539, Administration Series, duly certified copies whereof are hereto annexed for reference, and also under and by virtue of the rights and powers confirmed by said Act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular, the rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of every nature and kind whatsoever which the said Mississippi and Mexican Gulf Ship Canal Company has, or may have, under and by virtue of Act No. 30 of the Legislature of this State, entitled "An act to provide for the drainage of New Orleans," passed at the session of 1871, and of all other acts of the Legislature of this State, and which the said W. Van Norden, as transferee and pledgee

aforesaid, has, or may have, under and by virtue of the aforesaid act, passed on the 22d day of May, 1872, before the said Andrew Hero, Jr., notary.

And the said W. Van Norden, in his own name, individually declared that for the consideration and on the terms and conditions hereinafter set forth, he does, by these presents grant, bargain, sell, convey, transfer, assign and set over, with a full guarantee against all trouble, debts, mortgages, claims, evictions, donations, alienations or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said Ordinances Nos. 3479 and 3539, Administration Series, and also under and by virtue of the rights and powers conferred by said Act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof.

All and singular the following described dredgeboats and derricks, together with the machinery, engine, tackle, apparel and appurtenances, and all other necessaries thereto belonging, together with the hereinafter mentioned articles and effects, to-wit:

Dredgeboat No. 1, 70 feet long and 30 feet wide.

Dredgeboat No. 2, 70 feet long and 30 feet wide.

Dredgeboat No. 3, 70 feet long and 30 feet wide.

Dredgeboat No. 4, 70 feet long and 30 feet wide.

Dredgeboat, styled the J. O. Noyes, 62 feet long and 19 feet wide.

Dredgeboat, styled Clam Shall Dredge, 65 feet long and 30 feet wide.

Dredgeboat, known as Ridge Boat, 83 feet long and 30 feet wide.

Four derricks accompanying respectively dredgeboats Nos. 1, 2, 3 and 4.

One steam tug, known as the Olive.

One barge of far floating derricks.

One floating boarding house.

One lot of buildings at Halfway House.

One lot of large and small castings, including one heavy cast iron mainmast, two heavy cast iron topmasts, hoisting and surging drums, duplicate cog wheels and various small

castings, etc., the whole more fully set forth in a detailed inventory on file in the office of the city surveyor.

The said Warner Van Norden, in his own name, individually, is the owner of the above described dredgeboats, derricks and other effects and articles for having acquired the same by purchase from the said Mississippi and Mexican Gulf Ship Canal Company by act passed before the said A. Hero, notary, on the 22d day of November, 1872.

To have and to hold the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages of the said Mississippi and Mexican Gulf Ship Canal Company and of the said W. Van Norden, as transferee and pledgee aforesaid, and the said dredgeboats, derricks and other articles and effects above described, unto the said city of New Orleans forever, by virtue of these presents.

And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid, and his own name individually, declare that they, moreover, and by these presents, subrogate the said city of New Orleans, inand to all and singular the rights, actions and remedies to which they are or may be entitled under and by virtue of the aforesaid Act No. 30 of 1871, or of all other acts of the Legislature of this State, and under and by virtue of the afore recited acts passed before the said Andrew Hero, Jr., notary, respectively, and on the 22d day of May and 22d day of November, 1872, hereby authorize the said city of New Orleans to exercise and enjoy the said rights, actions and remedies in the same manner and to the same extent as it, the said Mississippi and Mexican Gulf Ship Canal Company and he, the said W. Van Norden, as transferee and pledgee and in his own name, individually, might or could have done.

The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts and advantages by the said Mississippi and Mexican Gulf Ship Canal Company, and the said W. Van Norden, as transferee and pledgee aforesaid, and the sale of the said dredgeboats, derricks and other articles and effects by the said W. Van Norden, in his own name, individually, are made and ac-

cepted for and in consideration of the price and sum of three hundred thousand ($300,000) dollars, payable in drainage warrants.

And now the said J. Mathers, Jr. and S. D. Moody, in their respective capacity, and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, declared that they have covenanted and agreed, and do, by these presents, covenant and agree, that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, ever had, or have now, or may have, against the said city of New Orleans. And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, does, moreover, by these presents, fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars, in drainage warrants, to the said Warner Van Norden.

And now, to these presents, personally came and appeared the Honorable John G. Brown, administrator of accounts of the city of New Orleans, who, by virtue of the authority in him vested by said Ordinance No. 3539, Administration Series, and of the rights and powers conferred by said Act No. 16, of acts of 1876, and with the consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company, has presently, in the presence of the notary and witnesses undersigned, handed over and delivered the said sum of three hundred thousand dollars ($300,000) in drainage warrants to the said Warner Van Norden, who as transferee and pledgee aforesaid, and in his own name, individually, and with the full and entire consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and for and in the name of the said company hereby acknowledging receipt of the same.

And for the purpose of providing for the payment of the warrants issued under and by virtue of these presents, and of all other drainage warrants heretofore issued and outstanding, the said city of New Orleaus, through its mayor aforesaid, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name, individually, do, by these presents, covenant and agree that the existing rights and powers of the holders of drainage warrants, under the civil acts of the Legislature of this State relative to drainage and drainage assessments, shall remain unimpaired, and that the drainage tax and assessment shall be administered, collected and paid in the manner and under the terms and conditions following, to-wit:

The bureau of drainage collections shall be organized in an office at the city, as follows, to-wit:

A book-keeper, who shall be appointed by the city council, and who shall keep such books and records, make such reports, and perform such duties as may be required by the administrators of finance and accounts. His salary shall not exceed two hundred dollars per month. Said officer shall not in any manner obstruct or delay the business of the office. He shall be removable by the council, upon the complaint of the collector, hereinafter provided for, for cause.

If desired by the said W. Van Norden, a duplicate set of books shall be made and placed subject to the use of the said collector.

Until the drainage warrants issue by virtue of these presents, in conformity with said Ordinance No. 3529, Administration Series, and all other drainage warrants, heretofore issued and now outstanding, shall be liquidated and paid, the collection of drainage assessments, shall be assigned to an officer, who shall be selected by the said W. Van Norden, and be confirmed by the city council. Said officer shall give bond with a good and solvent security in the sum of twenty-five thousand ($25,000) dollars for the prompt and faithful execution of the duties and powers provided by law for the collection of drainage assessments and the prompt and efficient collection of the same in accordance with law; and the business of his

office shall be subject to the supervision of the administrators of finance and accounts. He shall receive a compensation in lieu of expenses of all kinds, including books, bills, stationery, legal services, costs of court or clerk's hire of three hundred ($300) dollars per month and 2 1-2 per cent. commission on collection of drainage assessments, and shall make such monthly reports as may be required by the administrators of finance and accounts. Said collector shall be continued in office until the liquidation of the said drainage warrants issued by virtue of these presents or herotofore issued and now outstanding; and in case of death or resignation a successor shall be chosen as above provided for.

No receipt of the said collector for drainage assessment shall be valid unless countersigned by the administrator of finance.

The city council shall have the right to remove the said collector for good and sufficient cause, and a successor shall be appointed as herein above provided.

All expenses, fees and charges incurred in the collection of drainage assessment shall be paid out of the drainage fund.

All suits and judicial process and writs relating to appertaining to drainage assessments and taxes shall be and continue as heretofore controlled by the city council, and be conducted by the city attorney, but all writs of "*fieri facias*" to be issued as required by law and the judgments of the courts.

All parties owing drainage assessments shall have the right to pay the same in drainage warrants, at their face value and interest thereon, and the said collector and administrators of finance shall receive the same in satisfaction of all drainage assessments.

All parties owing drainage assessments in the fourth drainage district shall be entitled, upon the prompt payment of the four-tenths of the whole assessments, to an extension of time for the payment of the remaining six instalments; the said six instalments shall be paid yearly as prescribed by an ordinance already adopted by the city council.

And now the said Chas. J. Leeds, hereby promises for and binds and obligates the city of New Orleans, after the

date of these presents, to issue no drainage warrants other than those issued by virtue of these presents, in conformity with said Ordinance No. 3539, Administration Series, and such other drainage warrants as may now be issued and outstanding until said warrants have been fully liquidated and paid, and not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as herein above provided for, under any pretext whatsoever until the full and final payment of the same. And it is moreover well understood and agreed by and between the said parties hereto, that all work heretofore done by said Wm. Van Norden, not certified, shall be measured by the city surveyor, and the same shall be paid for in drainage warrants in the usual form, and that inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same.

And now by virtue of the foregoing, the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Warner Van Norden as transferee and pledgee aforesaid, and in his own name, individually, declared that they do, by these presents, remise, release and forever discharge the said city of New Orleans from and against any and all claims and demands of every nature and kind whatsoever which they ever had or have now or may have against the said city of New Orleans.

And now it is moreover well understood, covenanted and agreed that the said Mississippi and Mexican Gulf Ship Canal Company and the said Warner Van Norden, individually, and as transferee and pledgee aforesaid, shall and will, at all times, protect the said city of New Orleans, against and save it harmless from any and all claims and demands of every nature and kind whatsoever

which may have been, can now be or may hereafter be set up against the said city of New Orleans, or against them or either of them in reference to drainage work, arising out of their connection with the drainage of the city, or in any manner pertaining or relating to their acts, rights, franchises and privileges under said Act No. 30 of 1871, or in reference to the said dredgeboats, derricks and other articles and effects, provided, however, that the guarantee herein set forth shall not be considered as extending any further than to warrant the city of New Orleans in the title to the boats and property herein transferred to it by said W. Van Norden, and to save and indemnify the said city of New Orleans from any loss, injury or damage arising from the acts and conduct of the said Mississippi and Mexican Gulf Ship Canal Company, or the said Warner Van Norden in reference to, or arising from their connection with the drainage work herein referred to.

Thus done and passed in New Orleans, at my office, the day, month and year first above written, in the presence of Armand Pitot, Jr., and Gustave M. Letellier, competent witnesses, who have signed these presents with the said parties and me, notary, after reading the whole:

Original signed,

CHAS. J. LEEDS,
Mayor.
J. MATHERS,
President.
S. D. MOODY,
Secretary.
J. G. BROWN,
Admr. Pub. Acct.
W. VAN NORDEN,
A. PITOT, Jr.
G. M. LETELLIER,
G. LeGARDEUR,
Not. Pub.

Registered in conveyance book 108, folio 484.
New Orleans, June 7, 1876.
(Seal) (Signed) C. B. FISH,
Registrar.

A true copy of the original on and of record in my office.

New Orleans, June 9, 1876.

G. LEGARDEUR,
Not. Pub.

Ordinance No. 3479, A. S., for Appraisement of Property.

Filed with and made part of bill, Nov. 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, April 26, 1876.

(No. 3479—Administration Series.)

Be it ordained, That in accordance with the provisions of Act No. 16, approved February 24, 1876, Thomas S. Hardee, city surveyor, be and he is hereby authorized and instructed to make a thorough examination of the condition and value of all the dredge boats, machinery, tools and appurtances belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavating of canals or building protection levees, making a report to the committee of the whole, together with a statement of all information in the possession of his office, concerning damages claimed by the said Mississippi and Mexican Gulf Ship Canal Company, or transferee thereof.

Adopted by the Council of the city of New Orleans, April 25, 1876.

CHARLES J. LEEDS. Mayor.

Ordinance No. 3539, A. S.

Filed with and made part of bill, November 26, 1894.

MAYORALTY OF NEW ORLEANS,
CITY HALL, May 26, 1876.

(No. 3539—Administration Series.)

Be it ordained, That the mayor be and he is hereby authorized and instructed to enter into notarial agreement with the Mississippi and Mexican Gulf Ship Canal Company, or transferee, for the purchase of all dredge boats,

derricks, parts of machinery and property of every description belonging to the Mississippi and Mexican Gulf Ship Canal Company, or transferee, and used for the excavation of drainage canals or construction of protection levees, as per inventory of the city surveyor, also for the full settlement of all claims for damages and to secure the absolute sale, relinquishment and transfer to the city of New Orleans of all rights, privileges and franchises created, authorized or arising in favor of the Mississippi and Mexican Gulf Ship Canal Company and transferee, under and by virtue of Act No. 30 of 1871, or under and by virtue of all other acts of the Legislature of the State of Louisiana, or ordinances of the city of New Orleans, and embodying the terms agreed upon between W. Van Norden and the committee of the whole.

Be it ordained, that upon the execution of the aforesaid notarial agreement, the administrator of accounts be, and he is hereby authorized and directed to warrant upon the administrator of finance for the sum of $300,000, in drainage warrants, in full settlement, as above provided.

Adopted by the Council of the city of New Orleans, May 23, 1876.

Yeas—Bertoli, Brown, Bouny, Burke, Landry, McCarthy, Pilsbury.

CHARLES J. LEEDS, Mayor.

Agreement between Warner Van Norden and Mississippi and Mexican Gulf Ship Canal Co.

Filed with and made part of bill, Nov. 26, 1894.

STATE OF LOUISIANA, }
Parish and City of New Orleans. }

Be it known, that on this twenty-second day of May in the year of our Lord one thousand eight hundred and seventy-two, and of the independence of the United States of America, the ninety-sixth.

Before me, Andrew Hero, Jr., a notary public, in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared,

Lafayette Folger, president of the Mississippi and Mexican Gulf Ship Canal Company, a duly organized corporate body of this city and State, domiciled in this city and herein acting in his capacity as president thereof, under and by virtue of a resolution of the Board of Directors thereof, passed at their meeting held on the twenty-first inst., a duly certified copy of which said resolution is hereto annexed for reference.

Which said Lafayette Folger, declared that whereas, the work done by said Mississippi and Mexican Gulf Ship Canal Company, under the provisions of Act No. 30 of the Legislature of this State of the session of 1871, entitled an act to provide for the drainage of New Orleans is and has been always paid for in warrants, as provided for by Sec. 8 of the aforesaid act, owing to the want of funds in the city treasury therefor, which said warrants are only convertible in cash at a discount of twenty-five per cent. and more. And whereas, the expenditures of said company in constructing and executing the work provided for in said act are and have to be paid in cash, and it has been deemed judicious by the Board of Directors of said company to make some arrangement by which the necessary cash can be obtained.

And whereas, Warner Van Norden, of this city, has agreed to advance and furnish the said Mississippi and Mexican Gulf Ship Canal Company during the ensuing twelve months the sum of one hundred and fifty thousand dollars, to meet and discharge the expenses in doing said work upon the condition that he, said Van Norden, shall be paid and reimbursed all sums of money that may be so advanced out of the warrants, money or other revenues which may be obtained from the city of New Orleans, under the provisions of the aforesaid Act No. 30 of the Legislature of this State, and also that said sum of one hundred and fifty thousand dollars shall be given in such instalments as may be deemed necessary, as the work progresses, upon the notes or obligations of said company.

Now, therefore, in consideration of the premises, and in order to secure the payment and reimbursement of said loan of one hundred and fifty thousand dollars (together with all interest thereon) that may be furnished and advanced by said Warner Van Norden in the premises, said

Lafayette Folger moreover declared in his said capacity of president and for and on behalf of said Mississippi and and Mexican Gulf Ship Canal Company, that he does by these presents transfers, assign and set over unto the said Warner Van Orden, here present, accepting for himself, his heirs and assigns all and singular the right, title, interest, claim and demands of said Mississippi and Mexican Gulf Ship Canal Company in and to the privileges and advantages granted to it under the aforesaid Act No. 30 of the Legislature of this State entitled "An act to provide for the drainage of New Orleans," as well as in and to all sums of money, profits and benefits that may ensue or be realized by virtue of the performances and execution of the work therein provided for. And said Lafayette Folger in his aforesaid capacity moreover transfers and assigns unto said Warner Van Norden, any and all certificates, cash, warrants or bills that may be made out and delivered by the Surveyer, Administrator of Public Accounts or other officers of the city of New Orleans for any and all work done or performed by said company under the provisions of said act, hereby authorizing and empowering said Van Norden to demand and receive all such money, warrants or bills from said Surveyor, Administrator of Public Accounts or other officers and to collect and receive the amount or thereof.

Thus done and passed, in my office, at New Orleans aforesaid, in the presence of Paul A. Conand and George Cenas both of this city, who hereunto sign their names with the parties and me, the said notary, the day and date aforesaid.

Original signed: LAFAYETTE FOLGER,
President M. & M. G. Ship Canal Co.
W. VAN NORDEN.
ANDREW HERO, Jr.,
Not. Pub.

GEO. CENAS.
P. A. CONAND.

A true copy of the original on file in my office.
New Orleans, April 5th A. D. 1893.
(Seal) (Signed) ANDREW HERO, Not. Pub.

Sale of Dredgeboats by Mississippi and Mexican Gulf Ship Canal Co. by W. Van Norden.

Filed with and made part of bill Novr. 26, 1894.

State of Louisiana, Parish and City of New Orleans.

Be it known that on this twenty-second day of November in the year of our Lord one thousand eight hundred and seventy-two and of the independence of the United States of America, the ninety-seventh; before me, Andrew Hero, Jr., a notary public in and for the parish and city of New Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared

Lafayette Folger, the president and Samuel D. Moody, the secretary of the Mississippi and Mexican Gulf Ship Canal Company, a duly organized corporate body of this State, domiciled in this city, and herein acting in the said capacities and for and on behalf of said Mississippi and Mexican Gulf Ship Canal Company, under and by virtue of a resolution of the Board of Directors thereof, passed at their meeting held on this day; a duly certified copy of which said resolution is hereto annexed for reference.

Which said Messrs. Folger and Moody declared, in their said capacities and for and on behalf of said Mississippi and Mexican Gulf Ship Canal Company, that for the consideration and on the terms and conditions hereinafter expressed, they do by these presents grant, bargain, sell, convey, transfer, assign and set over, with all legal warranties, unto

Warner Van Norden, also of this city, here present accepting and purchasing for himself, his heirs and assigns, and acknowledging delivery and possession thereof.

All and singular the following described dredgeboats and derricks, together with their machinery, engines, tackle, apparel and appurtenances, and all other necessaries thereto belonging, together with the hereinafter mentioned and described articles of personal property, viz:

Dredgeboat No. 1, with steam derrick, now lying and

being and used and employed in the drainage canal of this city known and designated as the Upper Line canal.

Dredgeboat No. 2, with steam derrick, now lying and being and employed in the drainage canal of this city, known and designated as the Orleans Street Drainage canal.

Dredgeboat No. 3, with steam derrick, now lying and being or used and employed in the draining canal of this city known and designated as the Hagan Avenue canal, and near the Poydras Street Draining canal.

Dredgeboat No. 4, with steam derrick, now lying and being at or near the lake end of the new canal, and used or employed in the constructing of the Lake Protection levee.

Dredgeboat, known as the Ridge Boat, which was purchased from the city of New Orleans, now lying and being or used or employed in the draining canal of this city, known and designated as the Upper Line canal.

Dredgeboat, styled the "J. O. Noyes," now lying and being or used or employed in the draining canal of this city, known as the Carrollton Avenue canal, and near the Poydras Street Draining canal.

Dredgeboat styled "Clam Shell Dredge," now lying and being or used and employed in the draining canal of this city known and designated as the Upper Line canal.

One barge in said Upper Line canal attached to and working with the aforesaid derrick and dredgeboat No. 1.

Three flatboats, five skiffs, ten mules, two horses, one wagon, two drays.

The steam tug "Olive" of the burthen of eight tons or thereabouts now lying at the Lake End.

Blacksmith shops and carpenter shops of said company with all tools and fixtures thereof.

And all duplicate pieces of machinery.

To have and to hold the aforesaid dredgeboats, derricks and articles of personal property unto the said Warner Van Norden, his heirs and assigns forever.

And said Messrs. Folger and Moody in their said capacities hereby bind and obligate said Mississippi and Mexican Gulf Ship Canal Company and its assigns to

warrant and forever defend the dredgeboats, derricks and articles of personal property herein conveyed against all legal claims and demands whatever.

This sale is made and accepted for and in consideration of the price and sum of fifty thousand dollars, which has been settled in the manner following, viz: Whereas the said Mississippi and Mexican Gulf Ship Canal Company is justly and truly indebted unto said Warner Van Norden in the full sum of one hundred and sixty-one thousand nine hundred and sixty-two dollars and eighty-six cents, amount of monies heretofore advanced and furnished by him to the said company, to enable it to do and perform the work provided for under Act No. 30, of the Legislature of this State for the year 1871. Now therefore in full settlement and liquidation of said purchase price the said Warner Van Norden hereby gives and grants the said Mississippi and Mexican Gulf Ship Canal Company an acquittance and discharge to the extent and amount of fifty thousand dollars on account of its said indebtedness, reserving in full force and effect all his claims, rights and privileges for the balance remaining unpaid of said indebtedness, with which said partial release said Messrs. Folger and Moody declare the said Mississippi and Mexican Gulf Ship Canal Company to be satisfied, contented and paid, and in their said capacities hereby grant said Van Norden a full acquittance and discharge in the premises.

Thus done and passed, in my office, at New Orleans aforesaid, in the presence of George Cenas and Paul A. Conand, witnesses, both of this city, who hereunto sign their names with the parties and me, the said notary, the day and date aforesaid.

Original signed: L. FOLGER, President,
S. D. MOODY, Secretary,
W. VAN NORDEN.

P. A. CONAND,
GEO. CENAS.

ANDREW HERO, JR.,
Not. Pub.

A true copy of the original on file in my office.
New Orleans, November 28th, 1888.

(Seal) (Signed) ANDREW HERO, JR.,
Not. Pub.

Copy of Drainage Warrant.

Filed with and made part of bill, Novr. 26, 1894.

(Copy)

No. 379. DEPARTMENT OF PUBLIC ACCOUNTS,
$2000.00. New Orleans, June 6, 1876.

To the Administrator of Finance, City of New Orleans.

Ord. 3539, A. S.

Pay to the order of W. Van Norden, Transferee of the Mississippi and Mexican Gulf Ship Canal Company,

Two thousand dollars out of any funds in the City Treasury to the credit of said company.

Drainage Warrant

This warrant is issued in accordance with the provision of Act 30 of the Session of the General Assembly of the State of Louisiana, held in the year 1871, and the Administrator of Finance, on presentation to him of this warrant, will pay the same in cash, in case there be any funds in the City Treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant then the Administrator of Finance is required to endorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of eight per cent. per annum from and after the date of such presentation and endorsement, until paid.

Charge Mississipi and Mexican Gulf Ship Canal Company.

(Signed) J. G. BROWN,
Administrator of Accounts.

Presented for payment June 6th, 1876.

(Signed) E. PILSBURY,
Administrator of Finance.

Endorsed—W. Van Norden, Transferee.

Ordinance 2460, A. S., Authorizing Receipt of Drainage Warrants in Payment of Drainage Taxes.

Filed with and made part of bill, November 26, 1894.

Mayoralty of New Orleans, City Hall, December 31, 1873.

(No. 2460—Administration Series.)

An ordinance authorizing the receipt of drainage warrants in payment of drainage taxes.

Be it ordained, That from and after the passage of this ordinance all drainage warrants heretofore or hereafter, issued by the Administrator of Public Accounts, under Act No. 30, of the Legislature of 1871, with the accrued interest thereon, shall be receivable by the Administration of Finance in payment of drainage taxes; and in order to facilitate the payment of said taxes, the Administrator of Public Accounts shall, on the application of any holder of a drainage warrant of larger amount than the drainage tax which is to be paid, divide said warrant into suitable sums.

Adopted by the Council of the city of New Orleans, December 30, 1873.

Yeas—Brewster, Calhoun, Fitzenreiter, Lewis, Schneider, Sturcken, Turnbull.

LOUIS A. WILTZ, Mayor.

A true copy:

DANIEL SCULLY, Secretary.

Assessment No. "1."

Filed with and made part of bill, November 26, 1894.

COMMISSIONER'S OFFICE, FIRST DRAINING DISTRICT,
NEW ORLEANS, Sept'r 13, 1861.

The board met at 5 P. M., Mr. N. E. Baily in the chair.

Present: Messrs. Baily, Slawson, and Richards.

The minutes of the last meeting were read and adopted.

The following resolutions were offered and passed, viz.:

No. 22. *Resolved*, That bonds having (20) twenty years to run be issued to the amount of three hundred and fifty thousand (350,000) dollars and bearing interest at the rate of six (6) per cent. per annum.

No. 23. *Resolved*, That an assessment of three mills and three-tenths be levied upon each superficial or square

foot of the lands situated within the limits of the First Draining District, one-tenth of said amount to be collected within the ensuing twelve months.

The board adjourned at 9 P. M.

"*Assessment No. 2.*"

Filed with and made part of bill, November 26, 1894.

2ND DRAINING DISTRICT,
NEW ORLEANS, March 11th, 1861.

Regular monthly meeting.

Present: Messrs. L. H. Place, president; Messrs. Laville beyvre, Muncaster, and Godwin, com'rs.

On motion, it was

Resolved, That an assessment of two mills per superficial square foot on all the lands lying within the limits of the Second Draining District be levied in order to pay the principal and interest of the bonds authorized by act of Legislature, to be issued by the board for the purpose of defraying the costs of drainage, and that one-tenth part thereof shall be collected yearly.

The first instalment shall be payable during all the month of June, the present year and the subsequent instalments shall be payable in each year between the 1st day of April and the 1st day of June.

(Signed) AUG. S. PETERS, Sec.

"*Assessment No. 3.*"

Filed with and made part of bill, November 26, 1894.

Ordinance No, 1569, Administration Series.

MAYORALTY OF NEW ORLEANS,
CITY HALL, June 11th, 1872.

No. 1569, Administration Series.

An ordinance making an assessment upon lands of the Third Draining District.

Section 1. Be it ordained by the Council of the City of New Orleans, That an assessment of two mills per superficial foot in accordance with the authorization and direction of the statutes of the State be, and is hereby

made upon all the lands comprised within the Third Draining District created and defined by the act of the General Assembly of the State of Louisiana entitled "An act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18th, 1858, and that the assessment roll prepared by the Department of Public Accounts of the city of New Orleans containing a description of the landed properties embraced in said district, with the names of the owners thereof, so far as known, and all the requisites required by law, herewith submitted to the Council, be and is hereby adopted as the assessment made upon land upon each portion thereof described in said roll and against the owners thereof respectively.

Sec. 2. Be it further ordained, etc., That this ordinance shall take effect from its passage.

Adopted by the Council of the City of New Orleans, June 11, 1872.

(Signed) BENJ. F. FLANDERS, Mayor.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

"*Assessment 4.*"

Filed with and made part of bill, November 26, 1894.

Ordinance 1877, New Orleans, Nov'r 20. 1872, making an assessment on lands of the Fourth Draining District.

Section 1. Be it ordained by the Council of the City of New Orleans, That an assessment of (2) two mills per superficial foot, in accordance with the authorization and direction of the statutes of the State, be, and is hereby made upon all the land comprised within the Fourth Drainage District, created and defined by the act of the General Assembly of the State of Louisiana entitled "An act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," and approved March 18th, 1858, and subsequent Act No. 30 of the Legislature of 1871, of Febr'y 24, both or either of said statutes; that the assessment roll prepared by the Department of Public

Accounts of the city of New Orleans containing a description of the landed properties embraced in said district, with the names of the owners thereof, so far as known and all requisites required by law, herewith submitted to the Council, be, and is hereby adopted as the assessment made upon said land and upon each portion thereof described in said roll and against the owners respectively.

Section 2. That this ordinance shall take effect from its passage.

(Signed) BENJ. F. FLANDERS, Mayor.

Adopted November 19, 1872.

Yeas—Cockrem, Shaw, Dellassize, Remick, Lewis, Walton, Bonzano.

Assignment and Transfer by W. Van Norden to John G. Warner.

Filed with and made part of bill, November 26, 1894.

Whereas on the seventh day of June, 1876, I sold to the city of New Orleans, all the dredge boats and other property and franchise of the Mississippi and Mexican Gulf Ship Canal Company, belonging to me as transferee thereof, as will more fully appear by reference to an act of sale passed before Gustave Legardeur, Jr., notary public, on the seventh day of June, 1876, which is made part hereof, for $320,000 in drainage warrants, which warrants I have since parted with for valuable considerations, and whereas I believed at the time of parting with the same, and intended to transfer to each subsequent holder of said drainage warrants, each, any, and all the rights which might, could, or did at any time enure to me as vendor of said property, as well as each, any, and all rights which might accrue in my favor out of said act of sale, or the conduct of the city of New Orleans under said act of sale, or the violation of any of its duties thereunder since the date thereof, or by reason of any act of omission or commission that said city may have been guilty of since said date, or that has or might have accrued in any other manner:

Now, in consideration of the premises, and for other good and valuable consideration, I hereby assign, transfer,

and set over, with full subrogation, to John G. Warner of the city of Brooklyn and State of New York as a holder of said drainage warrants, for himself, and each and every holder of said warrants or any of them, or of drainage warrants issued and delivered for drainage work done under Act No. 30 of the Legislature of Louisiana of the year 1871, who may bring suit through him, by Richard DeGray as his attorney and counsellor at law, or solicitor in chancery, each, any, and all actions and right or rights of action, that I may at any time have had or now have against said city of New Orleans, growing out of said sale, or the conduct of said city of New Orleans since said sale, and especially all actions and rights of action, either in law or in equity, which have at any time arisen in my favor by reason of said city of New Orleans violating any of her duties under said act of sale entered into between myself as transferee aforesaid and said city of New Orleans pursuant to Act No. 16 of the Legislature of the State of Louisiana of the year 1876, approved on the 24th day of February, 1876, the purpose of this assignment being, to place the holders of said drainage warrants, or any of them, through the said John G. Warner and his said attorney, counsellor, and solicitor above named in my place and stead, and entitle them and each of them, to any and all the rights that I ever may have had or now have, in, to, or under said warrants, or under said act of sale, or either of them or in any other manner, against said city of New Orleans, or any other party or parties whomsoever.

(Signed) W. VAN NORDEN, (L. S.)

Signed, sealed and delivered in presence of the undersigned, on the 20th October, 1894.

(Signed) RICHARD DEGRAY.
(Signed) RUFUS K. McHAIG.

STATE OF NEW YORK, }
City and County of New York. } *ss.*

Be it known that on this 20th day of October, A.D. 1894 before me the subscriber, a commissioner of deeds for the State of Louisiana residing in the city, county and State of New York, came Warner Van Norden, a

resident of said city to me known as the party who executed the foregoing instrument, which he signed in my presence and the presence of Richard DeGray, the same being a competent witness and the said Warner Van Norden acknowledged that he signed, executed and delivered the same as his free act and deed for the uses and purposes therein expressed.

(Seal) (Signed) RUFUS McHAIG,
A Commissioner for the State of Louisiana, 137 Broadway, New York.

Pleadings in the Case of John Crossley & Sons, Limited, vs. City of New Orleans.

No. 9384 of the Docket of the U. S. Circuit Court. Petition $436,782.55 and Interest, filed April 18, 1881.

To the Honorable the Judges of the United States Circuit Court, holding sessions in and for the Fifth Circuit, Eastern District of Louisiana:

The petition of "John Crossley & Sons, Limited," a commercial concern, established by articles of association, bearing date November 18, 1864, under the Joint Stock Company Act of England, passed in the year 1862, having its domicile, or principal place of business at Halifax, England, and the said company, and all of its stockholders being aliens to the United States, respectfully represents:

That the city of New Orleans, a municipal corporation chartered by the laws of the State of Louisiana, and a citizen thereof, located in the parish of Orleans, in said State, is justly and truly indebted unto your petitioners in the sum of four hundred and thirty-six thousand, seven hundred and eighty-two 55-100 dollars, with interest as hereinafter claimed for this, to-wit:

That in the year 1871, the State of Louisiana, with a view to provide for the drainage of the aforesaid city of New Orleans, duly made and passed a certain act, known and designated as Act No. 30, of the sessions of the General Assembly of said State for the year 1871; as will more fully and at large, appear from the said act, published in the session laws, for the year aforesaid, page 75, *et seq.*,

and to which, for greater certainty, your petitioners respectfully refer your Honors.

Further they show, that in and by the act aforesaid, the character and extent of the work were prescribed; the measurement of such contemplated work, the way and means of raising funds for the payment thereof, and the manner of making payment were duly provided for; and the Mississippi and Mexican Gulf Ship Canal Company, was authorized and empowered to commence, construct and complete the work aforesaid, on accordance with the enactments and provisions of the aforesaid statute, No. 30.

And your petitioners further show unto your Honors that Section 8 of the act aforesaid, reads as follows:

"That at the end of every month, it shall be the duty of the city surveyor of New Orleans, or an engineer appointed by the Board of Administrators for that purpose to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during said month and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated, and the number of cubic yards of protection levees built during the said month. It shall be the duty of the Administrator of Accounts, on the presentation to him of the certificate of the city surveyor or engineer appointed by the Board of Administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of 50 cents per cubic yard of excavation, and 50 cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the president of said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to enforce upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of 8

per cent. per annum until paid, which condition shall be set forth in the form of said warrant or warrants."

Further they show, that a large number of drainage warrants, particularly designated and referred to in the accompanying exhibit, marked A, amounting to $214,-208.80, were issued under, and in strict comformity to, the provisions of the aforesaid section of Act No. 30, of the year 1871; and that the same are now owned by, and are in the actual possession of, your petitioners, as pledgees of the Louisiana Saving Bank and Safe Deposit Company—having been acquired by petitioners, in due course of business, for a valid consideration, and in good faith—as your petitioners will show upon the trial of this cause.

That certain other drainage warrants, particularly designated and referred to in the accompanying Exhibit B, amounting, in the aggregate, to $520,573.75—were issued under, and in strict conformity to, the provisions of the aforesaid Sec. 8 of Act 30, of the year 1871; and that the warrants last aforesaid are now owned by, and are in the actual possession of, your petitioners—they having acquired the same, in due course of business, for a valid consideration, and in good faith.

And your petitioners further show unto your Honors, that in the year 1876, an act was passed by the General Assembly of the State of Louisiana, and approved by the Governor of that State, February 24, 1876, authorizing the city of New Orleans, to assume exclusive control of all drainage work, theretofore agreed to be done and performed by the Mississippi and Mexican Gulf Ship Canal Company, in the drainage district of the said city of New Orleans, and to purchase from the aforesaid company, and its transferee Warner Van Norden, all the rights, franchises, and privileges, created by Act No. 30, of 1871, and all tools, implements, machines, boats and apparatus, belonging to the said company, or its aforesaid transferee, and by it, or him, used for, or pertaining to, drainage work authorized to be done by the aforesaid Act No. 30: As will more fully and at large appear from the said statute, known and designated as Act No. 16, of the sessions of the General Assembly of the State of Louisiana, for the year 1876, published in the session laws of that year pages 35 and 36, and to which, for greater certainty, your Honors are respectfully referred.

That, in and by the act last aforesaid, the city of New Orleans, in consideration of such sale and conveyance to her, was authorized and required to issue her certain warrants, drawn by the administrator of public accounts of the said city, upon the administrator of finance of the city of New Orleans; and which said warrants were to be made payable to the Mississippi and Mexican Gulf Ship Canal Company, or Warner Van Norden, transferee, and to his order.

Further, your petitioners show unto your Honors, that on the 7th day of June, A. D. 1876, the aforesaid company, and its said transferee, by an authentic act, duly made and executed before G. LeGardeur, notary public of the parish of Orleans, sold, assigned, transferred and conveyed to the city of New Orleans, in her own right, all and singular the rights, privileges, and franchises acquired by them, under the aforesaid Act No. 30; also certain dredgeboats and derricks, together with the machinery, engines, tackle, apparel and appurtenances, and finally, certain other property, articles and effects; and that in consideration of such sale to the city of New Orleans, the said corporation issued to the aforesaid company, or its transferee, certain warrants drawn by the administrator of accounts of said city, recognized and endorsed by the administrator of finance thereof, to the extent of $300,000.00, bearing interest; as will more fully, and at large, appear, from the authentic act aforesaid, and to which for greater certainty your petitioners respectfully refer the courts.

And furthermore they show that they are the owners, and in the actual possession of a certain portion of the warrants herein above last referred to, amounting in the aggregate to the sum of $120,000 having acquired the same in due course of business, for an adequate consideration, and in good faith; that the warrants last aforesaid are particularly designated in exhibits C, hereunto annexed and made a part hereof; and your petitioners, for greater certainty, respectfully refer your Honors to the same, and to the warrants therein listed.

That your petitioners also hold and own certain other drainage warrants, amounting to $50,000.00 or thereabouts at the same time, and acquired by petitioners un-

der the same circumstances, as the warrants aforesaid, for $120,000.00; that your petitioners are unable, at the present time, to designate the warrants for $50,000,00, or thereabouts by numbers or amounts: but that if required so to do by the said defendants, petitioners will, hereafter, file an exhibit, fully disclosing such identity.

That upon the execution of the authentic act aforesaid, the city of New Orleans took into her possession, and has converted to her own exclusive use and benefit, all the property and effects, and the thing, transferred and conveyed to her as aforesaid; never having returned the same, nor offered to return the same, nor any part or portion thereof, to the said company, its transferee, or any person or party whomsoever; as your petitioners will fully show upon the trial of this cause.

And your petitioners further show unto your Honors, that, in addition to the independent obligation and liability of the city, your petitioners have the cumulative right to be paid all of the aforesaid warrants held by your petitioners as aforesaid out of the drainage tax now due and uncollected in the said city, amounting to a sum in excess of seven hundred thousand dollars ($700,000); that in and by the provisions of legislative Act No. 30, of the sessions of 1871, hereinabove referred to, and in and by the stipulations and conditions found and contained in the aforesaid authentic act, of June 7, 1876, it was, and is now, the duty of the said city of New Orleans, to collect said tax, and to apply the same, or the proceeds thereof, to the extinguishment and payment of the warrants held by your petitioners; that the city of New Orleans, and the mayor and administrators thereof, during the month of April, 1881, and prior thereto, have arbitrarily and unlawfully refused, and do now refuse, to collect said tax for the purpose of paying the aforesaid warrants, or for any other purpose, and have gone so far as to counsel, advise, and influence the drainage tax debtors not to pay, any part or portion of the drainage assessment lawfully imposed and levied upon their property; and, that by reason, and on account, of the illegal conduct of the said city, and the municipal officers aforesaid, the collection of the aforesaid drainage tax has been entirely prevented, and your petitioners have sustained a loss and

damage to the full extent of the warrants held and owned by them as aforesaid—principal and interest.

Aver an amicable demand, and refusal to pay.

The premises considered your petitioners pray, that the city of New Orleans may be cited to appear and answer this petition; that in due course of law she may be condemned to pay unto your petitioners the sum of four hundred and thirty-six thousand, seven hundred and eighty-two 55-100 dollars—$436,782.55, the face amount of the aforesaid drainage warrants together with the interest, at the rate, from the dates, and in the amount called for and prescribed therein; and that your petitioners may have such other and further order, judgment and decree as may be suited to law and the nature of this case, together with the costs of this suit in that behalf expended.

(Signed) LACEY & BUTLER,
Attorneys for John Crossley & Sons, Limited.

Exception for "Oyer."

Filed May 11, 1881.

To the Hon. the Judges of the United States Circuit Court for the Fifth Circuit and District of Louisiana.

JNO. CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } No. 9384.

And in this Hon. Court through undersigned attorneys appears the defendant herein the city of New Orleans and reserving the benefit of all exceptions, pleas or answers that may be made herein and without in any manner pleading to plaintiffs' petition, says: that before so pleading or answering she is entitled to oyer and inspection of each and every one of the pretended drainage warrants on which this suit is founded as set forth in plaintiffs' petition and the exhibits thereto annexed.

Wherefore, defendant respectfully prays that this prayer for oyer of the warrants sued on be granted; that plaintiff be ordered to file same within a delay to be fixed by the

court and in default thereof that this suit be dismissed and she prays for general relief, etc.

(Signed) C. F. BUCK,
City Attorney.
WYNNE ROGERS,
Of Counsel.

Supplemental and Amended Petition.

Filed May 21, 1881.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } No. 9384.

To the Honorable, the Judges of the United States Circuit Court, Eastern District of Louisiana:

The amended and supplemental petition of John Crossley & Sons, Limited, respectfully represents:

That in the original petition herein filed, your petitioners have prayed that the city of New Orleans be condemned to pay unto your petitioners the sum of four hundred and thirty-six thousand seven hundred and eighty-two 55–100 dollars, the face amount of the aforesaid drainage warrants, together with interest at the rate from the dates and in the amount provided for therein.

That your petitioners are desirous of enlarging the prayer of the said petition, by adding thereunto, the following:

"And, in case of a failure on the part of your petitioners, to have and recover the judgment herein above prayed for, in whole or in part, then, and in that event, the city of New Orleans may be ordered, adjudged and decreed to pay into the hands of the Administrator of Finance of said city, out of the aforesaid claim for $436,-782.55, such sum as the court may refuse to compel the said city to pay directly to your petitioners—in order that the same may be applied by the aforesaid administrator *pro rata*, to the payment and extinguishment of the drainage warrants held by your petitioners, and that failing, to the extinguishment of drainage warrants, as prescribed by Section 8, Act 30, 1871, and Act 16 of 1876.

The premises considered your petitioners pray that the amendment aforesaid may be allowed, that defendant be duly cited to answer this amended petition, and that judgment may be entered in conformity to the prayer of the original petition, and the amendments thereto, herein above set forth.

Petitioners further pray for general relief in the premises.

(Signed) LACEY & BUTLER,
Attorneys for John Crossley & Sons, Limited.

Let the within amended and supplemental petition be allowed and filed. New Orleans, May 21st, 1881.

(Signed) EDWARD C. BILLINGS, Judge.

Exception,

Filed June 25, 1881.

To the Hon. the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern Dist. of La.:

JNO. CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } No. 9384.

And now appears the city of New Orleans, defendant herein, through undersigned counsel and reserving all other means of exception and defense, peremptorily excepts to plaintiffs' petition on the ground that it discloses no cause of action.

Wherefore, she prays that this exception be maintained and plaintiffs' suit dismissed at their costs and for general relief, etc.

(Signed) C. F. BUCK, City Atty,
WYNNE ROGERS,
Of Counsel.

Supplemental Petition,

Filed Nov. 19, 1881.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN CROSSLEY & SONS, LD.,
vs.
THE CITY OF NEW ORLEANS. } No. 9384.

To the Honorable the Judges of the United States Circuit Court, holding sessions in and for the 5th Circuit, Eastern District of Louisiana:

The supplemental and amended petition of John Crossley & Sons, Ld., respectfully represents:

That, at the time of the commission by the city of New Orleans of the illegal and tortious acts and doings referred to in, and disclosed by, the original petition of your petitioners herein filed, the said city was indebted in an amount exceeding two hundred and fifty thousand dollars, for drainage assessments, levied and imposed by law; that certain citizens and property owners of said city, were also indebted for their drainage tax, in a much larger amount; and that it was the lawful and bounden duty of said corporation, in enforcing and carrying out certain peremptory statutes of the State of Louisiana, for that purpose specially made and passed; and, in conformity to the contract referred to in the original petition, to have paid, promptly, its own indebtedness, as aforesaid, and to have enforced a prompt and vigorous collection of the drainage assessment, levied and imposed by law, upon other parties, for the purpose of paying certain drainage warrants, then and now owned by your petitioners and others.

Further your petitioners show, that the wrongs and offenses, above referred to, were done and committed, by the said city, among other improper notices, for the unjust and illegal purpose of evading the payment of a just debt, and to enrich itself at the expense of petitioners and others; furthermore, to influence the drainage tax debtors aforesaid, not to comply with certain obligations and duties resting upon and required of them, as good and law-abiding citizens of the State of Louisiana; and that the conduct of the said city, in the premises, was fraudulent, malicious, grossly negligent, and oppressive towards your petitioners, and other innocent and *bona fide* holders of drainage warrants, issued under and by virtue of the laws of the State of Louisiana, duly made and passed.

Further your petitioners show that by reason of the malicious, grossly negligent and oppressive conduct of said

city as aforesaid, your petitioners have sustained a loss and injury to the extent of at least $500,000.00.

Wherefore, they pray for leave to file this their supplemental and amended petition; and, leave being granted, they further pray that defendant may be cited to appear and answer the same; and that they may have and recover a judgment against said city of New Orleans, in addition to that demanded in the original petition, and the first supplemental petition, in the sum of $500,000.00, with interest, costs, and general relief in the premises.

(Signed) LACEY & BUTLER,
Attorneys.

Let the within amended and supplemental petition be allowed and filed.

New Orleans, November 19th, 1881.

(Signed) EDWARD C. BILLINGS,
Judge.

Exception, etc., to Amended and Supplemental Petition.

Filed Dec. 1st, 1881.

To the Hon. the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern Dist. of La.

JNO. CROSSLEY & SONS, LD.,
vs.
THE CITY OF NEW ORLEANS. } No. 9384.

And now appears the defendant the city of New Orleans, and reserving the benefit of all other means of exception and defences, etc., except to the amended supplemental petition herein filed on the 19th Nov., 1881, on the ground, to-wit:

1st. That the allegations in said amended and supplemental petition are too vague and indefinite to enable this appearer with safety to plead thereto.

2d. That acts or pretended illegal or malicious acts of the "City" in which the pretended demand for damages is founded are stated in too loose, general and indefinite a manner to enable defendant to answer.

3d. That said petition if in other respects sufficiently specific, etc., discloses no cause of action.

Wherefore, appearer prays that this exception be sustained and said amended and supplemental petition stricken from the record and dismissed or ordered to be amended within a delay to be fixed by the court; and as in duty bound, etc.

(Signed) C. F. BUCK, City Atty.
WYNNE ROGERS, of Counsel.

Petition for Mandamus.

In the case of State of Louisiana, ex rel. John Crossley & Sons, Ld., vs. City of New Orleans, et als., No. 4890 of the docket of the Civil District Court for the parish of Orleans, Division "A," and removed into the U. S. Circuit Court, Eastern District of Louisiana, under the Number 9935 of the docket. Transcript filed April 22, 1882.

Filed with and made part of bill of complaint.

(Stamps)

State of Louisiana, Civil District Court, for the Parish of Orleans.

STATE OF LOUISIANA EX REL.
JOHN CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS. } 4890.

Petition.

Filed Dec. 28, 1881.

To the Honorable the Judges of the Civil District Court for the parish of Orleans, State of Louisiana:

The State of Louisiana upon the relation of Jno. Crossley & Sons, Limited, a commercial concern established by articles of association, bearing date November 18, 1864, under the Joint Stock Company act of England passed in the year 1862, having its domicil, or principal place of business, at Halifax, England and the said company and each and every one, and all of the stockholders, being aliens to the United States, and subjects of the kingdom of Great Britain and Ireland, bring this their suit against the city of New Orleans, a municipal corporation established and created by the laws of the State of

Louisiana, within the parish of Orleans, State aforesaid, and a citizen of the said State, and a citizen of the said State, and of the United States. And your petitioners and relators show;

That heretofore, to-wit: on or about the year 1858, a certain act was passed by the General Assembly of the State of Louisiana to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parish of Orleans and Jefferson and that in and by said act, three separate and independent drainage sections were established known as the First, Second and Third Drainage Districts, were established known as the First, Second and Third Drainage Districts, and a board of commissioners provided for in each district. That the said boards were duly authorized and required to levy such uniform assessments upon the superficial or square foot of land situated within the drainage section or district of each board, as might be necessary to defray the expense of constructing levees, machinery, canals and other works necessary for carrying out the provisions of the aforesaid statute.

That for the purpose of more effectually providing for the drainage of the city of New Orleans, the State of Louisiana, in and by a certain act of the Legislature of said State, known as Act No. 30, passed at a session thereof, held in the year 1871, authorized and required the formation of a new and an additional drainage district, now known and designated as the Fourth Drainage District, and authorized and required the levy of a drainage tax upon all the property lying within such new or additional section, and against the owner and owners thereof.

And your petitioners and relators further show unto your Honors that the city of New Orleans being the owner of property lying within each of the four districts aforesaid, under and by virtue of Act 165, passed in the year 1858, and Act 30 of 1871 was assessed in an amount exceeding three or four hundred thousand dollars as will more fully appear from the assessment rolls of the several districts aforesaid which, or extracts from which, your petitioners and relators will introduce upon the trial of this cause.

That the tableaux or assessment rolls aforesaid have been duly homologated and approve by courts of com-

petent jurisdiction and by such homologation and approval final judgments have been rendered against the city of New Orleans, for the amount of the drainage assessments levied and imposed as aforesaid together with ten per cent. commission, 6 per cent. interest and costs.

That your petitioners and the relators aforesaid have caused to be served on William E. Huger, Administrator and Auditor of Public Accounts of said city a certified copy of the petition for the homologation of the drainage tax tableaux or assessment rolls of the several drainage districts aforesaid and of the several judgments aforesaid homologating and approving the same, and condemning the city of New Orleans to pay such assessments together with a certificate of the clerk, showing that no answer or opposition to the assessment or claim aforesaid was filed by the said city and that the several judgments against her as aforesaid have been, and are final and executory.

That at the time of serving the administrator of public accounts with the documents aforesaid relators requested the said administrator of public accounts to have the aforesaid judgments against the city of New Orleans and the extract from the assessment roll showing the amount of her monied liability as a drainage tax payer, registered in conformity to Act 5 of the General Assembly of La. for the year 1870, and to make due provision for the prompt payment of such judgments, through the municipal budget, and the budget tax in strict conformity to the provisions of that statute.

That as payment of the aforesaid judgments, through the budget and the budget tax, will subject relators to great and unjust delay in realizing their money, the municipal authorities of New Orleans with a view of an early payment of said judgments by said city, were requested by relators in addition to the registry and the budget tax aforesaid, to levy, impose and collect without delay a special tax sufficient to pay off and extinguish said judgments, principal, interests and costs.

Furthermore, your petitioners and relators show unto your Honors that defendants have refused to comply with relators and petitioners most reasonable demand, and have declared heir intenttion to refuse and resist the collection and payment of the drainage tax and the drainage tax judgments hereinabove particularly referred to.

Further they show, that relators as owners and pledgees are in the actual possession of drainage warrants issued under and by virtue of Act 30, of 1871, and Act 16, of 1876. That the indebtedness of the city of New Orleans as a drainage tax debtor has, by law, been set aside as a special fund for the payment of the warrants so held by petitioners; and that relators have the legal right to enforce collection of such indebtedness and to apply the amount collected to the payment of the drainage warrants to an amount in excess of $380,000 as authorized and prescribed by law, there being no other person or persons authorized by law to protect their rights in the premises.

Wherefore your petitioners pray that a writ of alternative mandamus may issue directed to the city of New Orleans, Joseph A. Shakspeare, mayor; Blaney T. Walshe, administrator of finance; Jno. Fitzpatrick, administrator of improvements; William Fagan, administrator of commerce; J. V. Guillotte, administrator of water works, and public buildings; George Delamore, administrator of assessments; W. E. Huger, administrator of accounts; P. O. Meallie, administrator of police, all of the city of New Orleans, and that therein and thereby the said W. E. Huger, administrator of public accounts, may be commanded and required without delay to register the several judgments against the city of New Orleans aforesaid in strict conformity to the provisions of Act 5 of 1876, together with extracts from the assessment roll aforesaid, or some certificate, statement or exhibit particularly showing the amount of the indebtedness of the city of New Orleans under such judgments.

That in and by the alternative writ of mandamus aforesaid, the several defendants to this suit may be condemned and required to budget the aforesaid judgments and to provide for their payment in accordance with law, through a budget tax to be levied and imposed in accordance with the aforesaid statute, and with the law in such cases made and provided.

That as a very great delay will attend the collection of the budget tax, and the payment of the aforesaid judgments in that manner, that they, the said defendants, and each and every one of them in and by the alternative writ aforesaid may be commanded and required in addition to the

aforesaid budget tax to levy at the same time a special tax upon all property situated within the corporate limits of the city of New Orleans liable to taxation, sufficient in amount to pay the aforesaid judgments, principal, interest, commission, and costs, after making an allowance of twenty per cent. for deficiencies in collection; and to collect said tax, and pay over the monies realized from such collection, without unreasonable delay and in accordance with the law in such cases made and provided, or show cause to the contrary at such time and place as may be fixed by your Honors.

That the aforesaid alternative writ of mandamus in due course of law, may be made peremptory and absolute and that relators and petitioners may have such other and further judgment, order, and decree, as is suited to law, and the nature of the case.

(Signed) LACEY & BUTLER,
Attys. for John Crossley & Sons, Limited.

Affidavit.

State of Louisiana, City of New Orleans, Civil District Court.

STATE OF LOUISIANA EX REL.
JOHN CROSSLEY & SONS, LIMITED,
vs.
CITY OF NEW ORLEANS.

Frank N. Butler, one of the attorneys of John Crossley & Sons, Limited, being duly sworn doth depose and say, that he has read the foregoing petition and knows the contents thereof and that the facts, allegations and averments set forth and contained therein, are true.

Further he says that the said John Crossley & Sons, Limited, are beyond the jurisdiction of the State of Louisiana, and for that reason this affidavit is made by deponent, and not by the said John Crossley & Sons, Limited.

And finally he says that this affidavit is made to the best of deponent's knowledge, information and belief.

(Signed) FRANK N. BUTLER.

Sworn to and subscribed before me this 28th day of Decbr. A. D. 1881.

(Signed) H. MIESTER, Dy. Clk.

"*Order.*"

Let an alternative writ of mandamus issue as within prayed for, and in accordance with law, returnable before this court, on Friday, the 13th day of January, 1882.

New Orleans, December 31, 1881.

(Signed) A. L. TISSOT, Judge.

Pleadings in the Case of John Crossley & Sons, Limited, vs. The City of New Orleans.

No. 10,337 of the Docket of the U. S. Circuit Court, Eastern District of Louisiana.

Referred to and made part of bill of complaint.

Bill of Complaint.

Filed August 24, 1883.

To the Honorable the Judges of the United States Circuit Court in and for the Eastern District of Louisiana:

John Crossley & Sons Limited, a body corporate and joint stock company, duly incorporated under the laws of the United Kingdom of Great Britain and Ireland, as such, an alien and subject of said United Kingdom, domiciled and doing business at Halifax, England, exhibits this their bill of complaint, filed on their own behalf as well as on behalf of all who hold obligations of the class held by your orators, who may intervene for their interest, willing to contribute to the costs of this suit, against the city of New Orleans, a municipal corporation created by the laws of Louisiana, for the government of said city, and a citizen of said State.

And, therefore, your orators and complainants say:

That in 1858, the Legislature of Louisiana, to provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, and thereby secure the proper drainage of New Orleans, passed an act by which all the lands between the Mississippi river, Lake Pontchartrain, the line of the Jefferson and Lake Pontchartrain Railroad and Lafayette avenue, were directed to be drained, and were divided into drain-

age districts designated as the First, Second and Third Districts; that by the authority of a later act of 1871, another draining district was created, called the Fourth Draining District, within the limits of Lafayette avenue, the Mississippi river, Bayou Bienvenue and Florida Walk, on a line connecting with Lafayette and People's avenues at a point nine thousand six hundred (9600) feet from the river; and the ordinance creating said Fourth Draining District is herewith filed as exhibit "A," and made part hereof.

That to fulfill the objects of said legislation, the said acts provided for the cutting and digging through said lands of all necessary canals; the making of all necessary levees; the placing on the lands of all steam engines and machinery needed for the purpose; and authorized all other act and things to be necessary to effect said drainage.

That to secure the funds required for said work, the said act of 1858 gave power to the Boards of Drainage Commissioners, to whom the direction of the work was confided, to levy assessments upon the lands to be drained, to be preceded by plans to be prepared by said commissioners, exhibiting the lands to be drained, the nature of the work to be done, the names of the proprietors, accompanied with notices by publication of the deposit of said plans in the office of the recorder of mortgages of the parish in which the land was situated, announcing that such drainage as shown by the plans would be proceeded with, and stating the supposed time required for completion and probable cost of the work; the act further provided for the homologation or approval of said plans by the district courts of the parishes within which the lands were situated, clothing said courts with power, on proof of the publication of said notices to decree that all said lands were subject to a first mortgage lien and privilege to secure its proportion of the cost of said drainage, with six (6) per cent. interest thereon; there was also provision in said act, for the recording of such final decrees in the office of the recorder of mortgages of the parish where the lands were situated; that by a subsequent legislative act it was provided that a tableau exhibiting said assessments for drainage should be prepared and filed in the

proper district court; that due notice thereof should be given by publication, and on proof of such publication the court should have power to approve and homologate said tableau or assessment roll, which should be a judgment against the property assessed, and against the owners thereof, for the amounts due by said owners for the amounts assessed upon said lands, on which judgments and executions should issue as upon other judgments, with ten (10) per cent. added to amounts assessed to pay costs and counsel fees. All of which more fully appears by reference to said acts, No. 165 of 1858, and No. 57, of 1861, specially referred to for fuller explanation and greater certainty.

Your orators further show that, in 1871, another act was passed by the Legislature of Louisiana, by which the boards of commissioners for drainage created by former acts were superseded, and in place of said boards, the Mississippi and Mexican Gulf Ship Canal Company, a corporation provided with all requisite means to perform the work, was directed and empowered to dig canals through said lands, make protection levees near Lake Pontchartrain, and above and below the city, to secure the lands from overflow, and by the proper drainage pumps and machines, to be provided by said company, to release the lands from drainage water by lifting the drainage water from the canals over and into Lake Pontchartrain in the rear of the city; the said act providing with detail that the new instrumentality selected to prosecute and complete such drainage should do all things requisite and proper to attain said object; that the act subrogated the Board of Administrators of the city of New Orleans to all the rights, powers and privileges of the commissioners of drainage, possessed by them under previous acts, especially the power to collect and enforce all the drainage assessments levied and imposed to defray the costs of said drainage, and all judgments recovered for said drainage by the homologation of the assessment rolls or tableaus: the act provided that for all canals dug, levees made and other work performed by said Mississippi and Mexican Gulf Ship Canal Company, payments should be made to said company from and out of all funds to be derived from said assessments, judgments thereof, or from

the sale of property turned over by the commissioners to said administrators; the payments to be made at the rates fixed by the act for levees and excavations, either in cash or in warrants drawn by the administrator of accounts of said city upon the administrator of finance, payable from and out of said funds, with eight (8) per cent. interest from the date of presentation, the act declaring that all amounts derived from said assessments, judgments therefor, and other aforesaid assets, should be a trust fund for the payment of the work done by said company, and of the warrants issued to it for said work, and should be held and applied by such board of administrators in trust solely for the said Mississippi and Mexican Gulf Ship Canal Company, and for payment of said work and warrants issued therefor; all of which more fully appears by said Act No. 30 of 1871, specially referred to for fuller explanation and greater certainty.

Your orators further show, that under said act the said Mississippi and Mexican Gulf Ship Canal Company proceeded with the said drainage work, excavated canals, made protection levees, provided and worked the machinery for draining the lands, and performed all services required by said act down to 1876, expending in the performance of the work large amounts of money; that said company received from the city of New Orleans warrants payable out of said trust funds amounting to upwards of five hundred thousand ($500,000) dollars, for the payment of which all said funds and the assessments, judgments therefor, and other assets aforesaid, were pledged.

Your orators further complaining, says: that pursuant to the authority conferred by said acts of 1858 and 1861, the Commissioners of Drainage prepared and filed plans designating the lands to be drained, the subdivisions of property therein contained, the names of the proprietors, the dimensions and direction of the canals, and the places where the engines were to be located; that said plans were deposited in the office of the Recorder of Mortgages of the parishes were the lands were situated, and after due publication of the notices as required by said act that the commissioners would proceed to drain said lands, naming place of deposit of plans defining limits of the lands to be drained and indicating as nearly as possible

the time required for completion and probable cost of the drainage, on the petition of said commissioners, decrees were rendered by the District Courts designated by the acts that such portion of said property within the limits of the section or district to be drained exhibited by the plans, was subject to a first mortgage lien or privilege in favor of said commissioners for such amounts as might be assessed upon said property for its part of the costs of such drainage, with interest thereon at six (6) per cent. per annum from demand, said judgment or decrees, the courts rendering same, dates of rendition and title of the proceedings are as follows, to-wit: The judgment "In the matter of the Commissioners of the *First* Draining District praying for a decree of mortgage, privilege, etc," duly rendered by the Honorable the Third District Court of New Orleans, on the 24th of August, 1861; the judgment "In the matter of the Board of Commissioners of the *Second* Draining District, praying for a decree of mortgage privilege, etc," duly rendered by the Honorable the Third Judicial District Court, parish of Jefferson, in suit No. 1938 of the docket, and signed on the 29th of April, 1861; the judgment "In the matter of the Board of Commissioners of the *Second* Draining District, praying etc.," duly rendered by the Honorable the Third District Court of New Orleans, and signed on the 9th of February, 1861; the judgment "In the matter of the city of New Orleans praying for a decree of mortgage, privilege, etc,. upon property in the *Third* Draining District, etc.," duly rendered by the Eighth District Court, parish of Orleans, and signed on the 4th day of May, 1872; and the judgment "In the matter of the Board of Administrators praying for recognition and recovery of assessments in *Fourth* Drainage District," duly rendered by the Superior District Court, parish of Orleans, in suit No. 807 of the docket, on the 29th of January, 1873, and signed on the 3d of February of that year; which said judgments are herewlth filed as part hereof, and marked exhibits B, C, D, E and F.

Your orators further show, that under the authority conferred by said act of 1858, the Board of Commissioners of the First Draining District, on the 12th of September, 1861, levied an assessment of three 3-10 mills per super-

ficial foot on the lands within said district, to pay the cost of said drainage directed by the act; that on the 11th of March, 1861, the Board of Commissioners of the Second Drainage District levied an assessment of two mills per superficial foot on the lands of said district, to pay said cost of drainage of said lands under same authority; that on the 11th June, 1872, the Board of Administrators of the city of New Orleans, then vested with the power to make said assessments by virtue of said Act No. 30 of 1871, levied an assessment of two mills per superficial foot on all lands within said Third District, to pay said cost of draining said lands; and on or about the 19th November, 1872, the said Board of Administrators, in exercise of said power, levied an assessment of two mills per superficial foot on all lands within the aforesaid Fourth Draining District, to pay the expense of draining same; all of which more fully appears by reference to the resolutions of said Boards of Commissioners and ordinances of the Common Council of the city levying such assessments, herewith filed and made a part hereof, and marked exhibits G, H, I and J.

Further complaining, your orators show that the tableaus or assessment rolls exhibiting the amounts assessed for such drainage, the names of the owners of the lands so far as known, and when unknown, stating the owners to be unknown, were duly filed in the courts hereinafter mentioned, designated by said act of 1871. and on motion, as provided by such acts, after due publication of the order that all persons concerned show cause why such assessment should not be approved and homologated, said tableaus or rolls were duly homologated and approved by the judgments of said courts, which by the terms of said act was and is now a judgment against the aforesaid lands and the owners thereof for the amounts assessed and ten per cent. for costs and counsel fees, and said judgments, the titles of the proceedings, the courts rendering the same, and dates of rendition are as follows, to-wit:

In the matter of the commissioners of the First Drainage District, praying, etc., No. 25,935 Superior District Court, parish of Orleans, the judgment homologating the assessment roll for said district was rendered on the 21st of March, 1874, by the Superior District Court for the par-

ish of Orleans. In the matter of the Commissioners of the Second Draining District praying, etc., No. 1938, the judgment homologating the assessment roll of said district above Toledano street, was rendered by the Third Judicial District Court for the parish of Jefferson, on the 15th, and signed on the 23d March 1869. In the matter of the Commissioners of the Second Draining District praying etc., No. 25,393, the judgment homologating the assessment roll for said district, below Toledano street, was rendered by the Third District Court for the parish of Orleans, on the 11th, and signed on the 18th November, 1868. In the matter of the Commissioners of the Third Drainage District praying etc., No. 7482, the judgment homologating said assessment roll for said district was rendered on the 8th, and signed on the 13th November, 1872, by the Eighth District Court for the parish of Orleans. In the matter of the Board of Administrators praying etc., No. 807, the judgment homologating the assessment roll for the Fourth Drainage District was rendered on the 15th, and signed on the 18th March, 1873, by the Superior District Court for the parish of Orleans. Said tableaus or assessments are specially referred to for fuller explanation and greater certainty, and copies of said judgments, marked B, C, D, E and F, are herewith filed and made part hereof.

Further complaining your orators show that in 1876, the Legislature authorized the city of New Orleans to contract with the Mississippi and Mexican Gulf Ship Canal Company for the purchase of its rights and franchises, tools, implements, machines, boats and apparatus belonging to said company and its transferees, the purchase price of said property to be paid in drainage warrants, payable out of the drainage assessments imposed under previous acts, in accordance with said act the said purchase was made, the city receiving from said company the said machines, boats, apparatus and implements of very great value, for which it agreed and bound itself to pay three hundred and twenty thousand dollars ($320,000) in drainage warrants, to be enforced and collected by the city, which said warrants were accordingly delivered to the assignee of said company, and ever since the city has had the possession and enjoyment of said

property, wholly disregarding its obligations to pay for the same, as is more fully stated hereinafter; that by such act the city assumed entire charge of said drainage, undertook to carry it on, availed itself of all the work done by said company, which, in compliance with all its obligations, had dug and excavated canals, built levees, and performed the services requisite to said drainage up to the 7th of June, 1876, when the city relieved the company and assumed control of the work; that the work so performed by the company, in all respects conformable to the acts on the subject, was adequate to secure the drainage proposed; requiring, of course, proper efforts on the part of the city to maintain and prosecute the system of drainage; that if there has been any default in said work, not admitted, it is due solely to the city since its assumption of the drainage work, and it follows that all of said drainage warrants issued for actual work and labor done by said company, and for said property bought, received and enjoyed by the city, but not paid for, are now entitled to be paid, and to the benefit of all the securities provided by said legislative acts. And your orators specially refer to said act No. 30 of 1871, for fuller explanation and greater certainty, and to the act of said purchase and settlement, of date the 7th of June, 1876, copy whereof marked exhibit K, is herewith filed and made part hereof.

And your orators show that said warrants were negotiable, were secured by all said drainage assessments pledged for their payment and by the obligation of the city imposed by law, as well as expressly assumed by the city, to collect, enforce and apply the funds derived from all said drainage assessments and the judgments therefor, to the payment of all said warrants; that on the faith of this obligation of the city, and of these securities, your orators acquired and now hold for actual value given by them, four hundred and thirty-six thousand seven hundred and eighty-two $\frac{55}{100}$ dollars ($436,782.55), of said drainage warrants issued by the city, and thereafter acquired by your orators, part issued to said company for work and labor done, part issued under said act of 1876, for the property bought and received by the city, all of which are unpaid, entitled to be paid and to the enforcement of all the obligations and securities pledged

for their payment; and your orators herewith file and make part hereof, copy of one of said warrants, and a list of those held by them, marked exhibits A l, and A m.

Your orators further show that said decrees of the courts subjecting all such lands to the first mortgage lien and privilege, to secure said amounts assessed for drainage, and homologating said assessment rolls constituting personal judgments against the land owners as well as the lands, for the amounts assessed, have been duly recorded in the offices of the Recorder of Mortgages of the parishes of Orleans and Jefferson, according to the situation of the lands, and are mortgages against the lands and owners thereof to secure said assessments, and that for the greater precaution, but not admitting the necessity thereof, proceedings have been instituted in the State courts to revive the judgments homologating said assessment rolls.

Your orators further show that subsequent to the issue of said warrants, and to the assumption by the city of said drainage work, the Legislature of Louisiana passed certain laws to exclude said lands from all liability for said assessments, to annul the judgments therefor, to cancel all liens, mortgages and privileges securing such assessments; and, finally, there is in the present city charter the enactment to repeal all laws for the drainage of the city, and forbidding the collection of said drainage assessments; all of which more fully appears by reference to the acts of the Legislature, No. 48 of 1877, No. 167 of 1877, and No. 20, Section 42, of 1882; specially referred to for fuller explanation and greater certainty.

Your orators show that the legislative acts under which said warrants issued, pledging said drainage assessments for their payment, were in legal effect contracts, under which the holders of the warrants were entitled to the benefit of all said securities, as well as to the fulfillment of the obligations of the city to enforce said assessments; that said legislative acts propose to liberate the lands, the owners thereof and the city of New Orleans from all liability to the holders of said warrants, entitled to all the securities the said acts propose to destroy; that said acts further propose to discharge the city from its obligations to pay the price of the property acquired by it under its

contract of purchase of 7th June, 1876, to be paid from and out of the drainage assessments, which the city by its said contract bound itself to collect and enforce; that in effect these legislative acts design to destroy the right of property in these drainage assessments; invade the rights of your orators; free all parties from liability; cancel all securities on the lands, and deprive your orators and all the warrant holders of all means of payment of these obligations, issued by the city, under the pledge of the guarantees and securities hereinbefore set forth, and your orators show that said legislative acts, and each of them, are void and null for plain repugnancy to the clauses of the Federal Constitution, that is to say the 1st Article, Section 10, and 15th Amendment of that instrument, prohibiting legislation, impairing the obligations of contracts, and protecting the rights of property, by which your orator's rights are secured.

And further complaining, your orators show that the city itself is an owner of lands within the drainage districts and a judgment debtor for assessments levied upon said lands, exhibited by the assessment rolls for said districts, duly approved and homologated, said assessments being as follows, that is to say:

In the First Draining District.....	$230,733 30
In the Second Draining District.....	171,708 65
In the Third Draining District.....	208,879 40
In the Fourth Draining District.....	66,611 55

aggregating six hundred and seventy-seven thousand, nine hundred and thirty-two $\frac{90}{100}$ dollars, all of which is unpaid and should be paid and applied by the city to pay said drainage warrants, and your orators refer to said assessment rolls for fuller explanation and certainty, and to the extracts therefrom, exhibiting said assessments against the city herewith filed as exhibit A n, and made part hereof.

And your orators further show that since the said legislation of 1877, the city has failed to enforce said assessments, neither paying its own or enforcing the assessments against the other drainage debtors, and now avers its purpose not to collect and enforce said assessments, make provisions to pay said warrants, or comply in any

manner with its obligations in the premises, and said avowal and refusal is manifested in the ordinance of the council of said city, passed on the 5th of April, 1881, and in the proclamation of the mayor of said city, published April 7th, 8th and 9th, 1881, copies whereof are herewith filed marked exhibit "A o" and made part hereof.

And now your orators shows that all such drainage assessments and judgments, therefore being pledged for redemption of said warrants, the funds to be derived therefrom constituting a trust fund to be collected and applied by the city to pay the warrants; the city itself debtor for drainage assessments; bound also for the price of the aforesaid property, which it bought, received and uses, neither paying the price in money or enforcing the assessment, as it bound itself to do, from which the price was to be paid, and the absolute refusal of the city to do anything in the premises, leaving the warrants it issued wholly unprovided for, entitles your orators without action or remedy at law, upon these warrants, to invoke relief in equity; that the refusal of the city to collect the assessments and pay for said property from the amounts thereof so collected, makes the city liable for said purchase price, three hundred and twenty thousand dollars; that it is also liable for the said assessments owed by it, all of which is applicable to pay the said warrants, as are also all said drainage assessments and judgments, the refusal to collect which and abandonment of the trust and obligation in that respect, on the part of the city, entitles your orators to the appointment of a receiver to collect and enforce said assessments, and to have applied, under the order and direction of this court, the amounts for which the city is bound, and the amounts of such assessments, aforesaid, to the full payment of all said warrants, with interest and costs.

To the end, therefore, that the said mortgages, liens and privileges may be decreed to exist upon each portion of the property situated within the limits of the drainage districts, exhibited by the plans filed under the act of 1858, designating the lands to be drained, may be adjudged legal and valid; that the aforesaid assessments for drainage and judgments therefor, levied and imposed under said acts of 1858 and of 1861, exhibited by said assessment

rolls or tableaus prepared, filed, affirmed and homologated under said acts, and the aforesaid decrees homologating said assessment tableaus may be decreed to be legal and valid judgments against the lands and owners exhibited by said tableaus, and be decreed to be enforced with interest and ten per cent. fixed by said acts; that a receiver be appointed with authority to demand, sue for, collect and enforce said assessments and judgments therefor; that the city of New Orleans be adjudged, bound and liable for the aforesaid assessments due by it, and for the purchase price of said property, and be condemned to pay the same, with interest; that an account be taken of all warrants entitled to payment from and out of said funds; that the said warrants held by your orators be decreed to be paid with interest and costs, with all others equally entitled from and out of the aforesaid amounts for which the city is liable, and from and out of all amounts derived from said drainage assessments and judgments therefor, and as fast as said amounts are collected.

And that your orators have all such further relief and as the nature of the case demands and equity confers.

May it please your Honors to grant unto your orators the writ of subpœna to be directed to the city of New Orleans, commanding it to be and appear on the day and in the delay named, before this Honorable Court, there to answer, all and singular, the premises aforesaid, and to stand to, perform and abide such orders the court may make in the premises, and your orators will ever pray.

BLANC & BUTLER,
MILLER & FINNEY,
Solicitors for Complainants.

Answer.

Filed Nov. 10, 1884.

In the Circuit Court of the United States for the Eastern District of Louisiana.

JOHN CROSSLEY & SONS, LIMITED,
versus
THE CITY OF NEW ORLEANS.
} No. 10,337.

The answer of the city of New Orleans, defendant, to the bill of complaint of John Crossley & Sons, Limited, complainants.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for it to make answer to, answering, says:

That, in the year 1858, the Legislature of Louisiana, by Act No. 165 of that year, entitled, "An act to provide for the leveeing, draining and reclaiming of *swamp* lands in certain portions of the parishes of Orleans and Jefferson," enacted that certain portions of said parishes should constitute three drainage districts, designated, respectively, as the First, Second and Third Drainage Districts, and that for each of said districts there should be a board of commissioners, which was constituted, for the purposes of the act, a body corporate; and, that, whenever either of said boards was prepared to drain its respective district, it should cause a plan thereof to be made, accurately designating the limits thereof, the subdivision of property therein contained and the names of the proprietors, and deposit said plan in the office of the recorder of mortgages and give notice thereof by publication, and, after due publication, apply, by petition, to the proper District Court, which court upon due proof of publication, should decree that each portion of the property situated within said limits is subject to a *first mortgage lien* and *privilege in favor* of such Board of Commissioners, for such amount as might be assessed upon said property. That the said Board of Commissioners were empowered to levy uniform assessments upon each superficial square foot of land situated within the district; and, that, on the non-payment of the amount of the assessment, judgment therefor should be recoverable before any court of competent jurisdiction, and the *land so assessed* should *be sold*, according to law, to satisfy said judgment; and the sum of $81,000, to be equally divided among said three draining districts, was appropriated out of the Swamp Land Fund, of the First Swamp Land District of the State, for the purpose of said act.

That in 1859 the Legislature of Louisiana passed an act, No. 191 of that year, supplementary to said Act No. 165, of 1858, whereby the said Boards of Commissioners were authorized to issue bonds, having not more than thirty years to run, and bearing interest not exceeding eight per cent. per annum, to an amount not exceeding $350,000 for each drainage district; and, upon issuing such bonds, "to fix and determine the amount of assessment to be levied upon the superficial square foot" of land within the respective districts, and to apportion the amount to be paid yearly by the owners of said lands, in order to pay the annual interest on said bonds and the bonds at maturity; provided, that the amount of the assessment demandable yearly should not exceed one-tenth of such assessment.

That in the year 1861 the Legislature passed an act, No. 57, of that year, whereby it was enacted "That the amount of assessment which the Boards of Commissioners of the several drainage districts are authorized to fix and apportion, to be paid yearly by the owner or owners of the lands within said districts, *in order to pay the annual interest on the bonds issued or to be issued by said Boards of Commissioners, by virtue* of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, approved March 18th, 1858, shall be collected and sued for, the following mode of proceedings, to-wit; As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the Third District Court of the parish of Orleans for the assessments made on the property within the limits of the parish of Orleans, and in the Third Judicial District Court, sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, on which tableau of assessment thus to be filed the property assessed shall be set forth, together with the amounts assessed and the names of the owners thereof: * * * that a petition shall be filed with said assessment rolls, praying for an order that all persons whom it may concern do show cause within thirty days from the first publication of said order, why said assessment roll should not be approved and homologated, * * *

and, after said publication, the said courts shall, on motion of the counsel of said boards of commissioners, approve and homologate said assessment rolls, which shall be a *judgment against the property assessed* and the owners thereof, on which *execution* may issue as on judgments rendered in the ordinary mode of procedure, and the court shall, at the same time, and in the same judgment, order delinquent parties to pay ten per cent. in addition to the amount assessed to pay counsel fees and costs.

Respondent says that it is true, as stated in the bill, that an additional drainage district, with the extent and limits stated in the bill, was established, and assessments upon the property therein made by ordinances of the Board of Administrators of the city upon assumption of authority so to do, under and by virtue of Act No. 30, of 1871, mentioned in the bill, but this respondent says that the said ordinances and the said act of the Legislature, in so far as construed, to confer such authority, and the further authority, as claimed, to proceed for the enforcement of said drainage assessments, by the summary mode of procedure described in Act No. 57, of 1861, have been subsequently, repeatedly and uniformly held by the courts of the State to be void and and inoperative; and respondent further says that in the suit entitled Mississippi and Mexican Ship Canal Company vs. City of New Orleans, 35 An. p. 68, it was expressly held by the Supreme Court of the State that the city of New Orleans was not liable to any extent or for any sum whatever, for said assessments and judgment therefor, claimed to have been recovered therefor, in proceedings had under and in conformity to said Act No. 57, of 1861, and Act No. 30, of 1871; and this respondent says that, by virtue and effect of said final judgment of the Supreme Court, the complainants as barred and stopped from claiming any relief in this proceeding against this respondent by reasons of said assessments and judgments; and respondent hopes it may have the same benefit of this ground of defence as if it had availed itself thereof in the form of a plea to so much of said bill as relates to said assessments and judgments.

Respondent says that it is true that by said Act No. 30 of 1871, the said boards of commissioners created by said

prior acts were superseded, and that the Mississippi and Mexican Gulf Ship Canal Company were empowered to carry on a system of drainage, and that the board of administrators of the city of New Orleans were subrogated and succeeded to the rights and duties of said boards of commissioners to the extent stated in said act; and respondent says that by said act it was provided that all work done by said Mississippi and Mexican Gulf Ship Canal Company should be paid for out of a drainage fund to be derived from said assessments, the payments to be made at the rates fixed by the act, either in cash, or where there was no cash at the time to the credit of said fund, in warrants upon said fund, to be drawn by the administrator of accounts on the administrator of finance, and that said drainage fund was declared by said act to be a trust fund for the payment of said warrants.

Respondent admits that under said act the said company proceeded with said drainage work and received drainage warrants therefor to about the amount stated in the bill, and that for the payment of said warrants the said drainage fund and the said assessments and judgments were pledged; that it is true that under said acts of 1858, 1859 and 1861, plans were filed, proceedings had and judgments entered, as stated in the bill; but, this respondent says, all of said proceedings and judgments, in so far as they were had and obtained in conformity to said Act No. 57 of 1861, have subsequently been held by the State courts, repeatedly and whenever called in question or sought to be maintained or enforced, to be void and inoperative.

This respondent admits that the several drainage assessments made by said Boards of Commissioners and Board of Administrators of the city of New Orleans and the divers proceedings and judgments for the enforcement thereof, averred and set forth in the bill, were made and had at the rates, and at the times and in the manner stated in the bill; but this respondent says that subsequent thereto and in proceedings had at the suit as well of complainants as of respondent for the maintenance and enforcement thereof in the State courts of competent jurisdiction, said proceedings and judgments have been repeatedly and uniformly held to be void and inoperativ.e

Respondent says, that in 1876, the Legislature passed

an act, No. 16 of that year, entitled, "An act to authorize the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company and its transferee; and to provide for the manner of making said purchase and for paying therefor *in drainage warrants*," by which act the Common Council of the city of New Orleans was authorized and empowered to contract with the said company and the transferee thereof for such purchase, and by the third section of which act it was expressly and specially enacted and declared that all amounts to be paid as the price and consideration of said purchase "shall be *paid in drainage warrants* by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act No. 30, of Acts of 1871, for work done;" and that such warrants "shall be made *payable out of the drainage assessments;*" and by the fourth section of said act, "that whenever the sale and purchase contemplated by this act shall be completed and the drainage warrants issued in payment of the price agreed on and fixed, the city of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by Act No. 30, of Acts of 1871, relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferee; the city of New Orleans shall alone have the power, either through its own officers or employees, or by contract to the lowest bidder, to do all canaling, dredging, ditching or drainage work required to be paid for by assessment upon property or from the city treasury."

And this respondent says that it is true, as stated in the bill, that in accordance with said Act No. 16, of 1876, the purchase contemplated and provided by said act was made by the city from the company and the transferee of said company, on the 7th of June, 1876, as per notarial act of purchase and settlement of that date, a copy of which is annexed to thebill as exhibit K; and that by said act it agreed and bound itself to pay three hundred and twenty thousand dollars in drainage warrants, and that said warrants were

accordingly delivered to the assignee of said company, as stated in the bill.

Respondent says that it is true that since said purchase the city has had possession and enjoyment of the property so purchased except as to a portion thereof, from which it has been evicted by creditors of the said Mississippi and Mexican Gulf Ship Canal Company, asserting rights thereupon paramount to the right acquired thereto by the city by said purchase from the said company and the transferee of said company, Warner Van Norden; but respondent says that it is not true as stated in the bill, that the city has wholly disregarded its obligation to pay for said property, but that on the contrary, the truth is that it made payment therefor in full in the manner stipulated for at the time of said purchase as stated in the same paragraph of the bill, in drainage warrants then delivered to the transferee of said company to the amount stated in the bill; and that this form of payment was the sole and only form of payment for which the municipal corporation of the city of New Orleans *was competent* to obligate or bind itself under the express terms of said Act No. 16, of 1876. This respondent says, that the law under which said drainage warrants were executed and delivered as the price and consideration of said purchase, as well as the laws under which said drainage warrants were issued, for work done under the terms of said acts, contemplated and intended that the drainage assessments, to meet and pay said warrants should be enforced and collected by said city, and that all amount collected therefrom should constitute a trust fund, to be held and applied to the payment and satisfaction of such warrants, the city not being entitled to apply any portion of such fund to any other purpose, except in the event of a surplus thereof remaining after the payment of all of said warrants; and respondent says that large sums to have heretofore been collected by it from such assessments and passed to the credit of said drainage trust fund, and that all amounts so collected have been applied to the payment of drainage work and drainage warrants, issued under the terms of said act; and as to the residue of said assessments remaining uncollected, that is has used all due diligence to collect the same by means of the judicial proceedings stated in the bill, and otherwise, without avail.

This respondent says that the said acts under which said warrants were issued, never contemplated or intended that they should become payable in any event or contingency, otherwise than out of said drainage fund, and that said warrants were executed and accepted with full knowledge by all parties that they were not, and could not, in any event, become chargeable to the city of New Orleans, or payable by it, otherwise than out of said drainage fund; that the corporate authorities of said city were and are, wholly without power or competency to bind the municipality to pay, or to provide means to pay said drainage warrants, otherwise than out of said drainage fund; and that it has at no time been competent to the corporate authorities of said city, under said acts or under any law applicable to the claims evidenced by said warrant, by any act or failure to act, on their part to incur any corporate liability in respect of said warrants, other than to the extent above stated, or to change the character of the liability or obligation evidenced by said warrants, from a charge upon a particular and specific fund, to-wit: the drainage fund aforesaid, into a general liability or obligation of the municipality, to be met by general municipal taxation, or otherwise, than out of the particular fund to be derived from said drainage assessment.

And respondent says that the said drainage assessments were and are amply sufficient in amount, if collected, to meet and pay all of said drainage assessments outstanding; that without fault of this respondent it has to a large extent been unable to enforce and collect said assessments; respondent admits that the holders of said drainage warrants are entitled to the benefit of all of said assessments, and of the proceedings and judgments stated in the bill, as far as they can be made effective and available as securities for the payment of said warrants, and to the appointment by the court of a receiver to enforce and collect said drainage warrants and to render said securities effective as far as may be, this respondent expressly admitting its inability to enforce or collect said drainage assessment or to enforce said judgments by further proceedings in the State courts or otherwise.

Respondent denies that said drainage warrants, though it is admitted that they are drawn payable to order, are

negotiable securities; and says that the laws hereinabove set forth under which said warrants were executed do not authorize or empower the execution or issuance by the city of New Orleans of securities negotiable in form; that the said warrants are not in the form of a bond or note of the city of New Orleans, binding the city absolutely for the payment of a certain sum of money at a certain time, but are merely orders drawn by one officer of the city, the Administrator of Accounts, on another officer of the city, the Administrator of Finance, for the payment of the sums of money specified in such orders, out of a particular fund, to-wit: the drainage fund, and not otherwise; and this respondent says that the holders or owners of such warrants, other than payees named in the warrants, are not entitled to claim the right to be dealt with as holders of negotiable securities, but can only claim as ordinary transferees or subrogees of the original holders.

Respondent denies that complainants are the owners, or holders, or lawful possessors of $436,782.55 of said drainage warrants, or of any of said warrants described in exhibits Ae, and Am, annexed to the bill. Respondent says, that said warrants are all of them the property of the Louisiana Savings Bank, a body corporate under the laws of Louisiana, now insolvent and in liquidation in the courts of the State; that in a certain suit instituted by complainants against the said Louisiana Savings Bank, in liquidation, in the Civil District Court of the State of Louisiana, for the parish of Orleans, and numbered 350 on the docket of said court, a final judgment has been rendered by said court, from which an appeal to the Supreme Court of the State, which decreed that all of said drainage warrants described is said exhibits, to the bill of complaint in this cause, are the property of said Louisiana Savings Bank, and that John Crossley & Sons, Limited, the complainants in this cause, have no interest in said warrants, beyond holding them as collateral security, for the reimbursement of a loan stipulated, to be made by them to said bank, by a certain letter of credit of May, 1879; that only a portion of the loan so stipulated to be made, was made; and that said John Crossley & Sons, Limited, are not entitled to hold said warrants, even as collateral security, except upon condition of the payment

by said John Crossley & Sons, Limited, to the said Louisiana Savings Bank, in liquidation, of the sum of $78,712.50; and the said judgment condemned the said John Crossley & Sons, Limited, in default of the payment of said sum, within sixty days to deliver said warrants held by them to the said bank; and this respondent is advised and says, that in the event of the affirmance by the Supreme Court of said judgment and the refusal or failure of complainants to pay said bank said sum of $78,712.50, as a condition precedent to their right to hold said warrants as collateral security as aforesaid, the said bank will be entitled to possession of all of said warrants, as owners thereof, and to hold this respondent liable and accountable in respect of whatever obligation of this respondent is evidenced by said warrant, and, in the meantime, this respondent submits that it is inequitable and unlawful to hold this respondent accountable in this proceeding, to said John Crossley & Sons, Limited, in respect of said warrants, the said complainants not being the owners of said warrants, or entitled to hold and enforce them as collateral security, as aforesaid; and this defendant hopes it may have the same benefit of this ground of defence, as if it had availed itself of it by way of plea to the whole bill, and all of the relief prayed for by complainants.

Respondent admits that the legislative acts under which said drainage warrants were issued, pledging said drainage assessments, for their payment, were, in legal effect, contracts under which the lawful holders of said warrants were and are entitled to the benefit of all of said securities, and that the several subsequent legislative acts in the bill specified, in so far as they purport, or were intended to impair the obligation of said contracts in the manner specified in the bill or otherwise, are null and void, for repugnancy to the Constitution of the United States, as stated in the bill.

Respondent admits that the lawful holders of said drainage warrants are entitled to the fulfillment of the obligations of the city, to enforce said assessments in the manner contemplated and intended by the acts under which said warrants were issued, in so far as said acts have not been held by the courts of the State to be inoperative and

void, and that said obligation remains unaffected by any of said subsequent legislative acts specified in the bill; and this obligation, respondent says it has heretofore discharged to the best of its ability by making the assessments and taking the judicial proceedings stated in the bill and other proceedings, but that these proceedings have, in the main, been rendered abortive and ineffective by rulings and judgments of State courts of competent jurisdiction, for which it is in no wise responsible or accountable; and, further, this respondent says again that, had there been any unlawful or improper action or failure to act by the city authorities in the premises, which is not admitted, but denied, by no action or failure to act of the corporate authorities, in the manner charged in the bill, or otherwise, could any other corporate liability or obligation in respect of said warrants be incurred than that specified in the acts under and by virtue of which they were issued, or the municipality be rendered liable for the payment of said warrants out of any other fund than the said drainage fund created by said act, and that, at no time, has it been competent to the corporate authorities, by any action or refusal or failure to act on their part, to change or enlarge the character of the indebtedness evidenced by said warrants from a charge on a particular fund, to-wit: the drainage fund, as aforesaid, to a general corporate indebtedness or liability chargeable against the corporate revenues generally, to be provided for by general corporate taxation, levied without reference to ownership of lands assessed for drainage under said acts authorizing the issuance of said warrants.

Respondent admits the ownership of much, though not of all, of the property described in the bill, as the property of the city of New Orleans. Among the property so described is the square upon which the United States Mint is located, which is not the property of the city; included in such description, also, are all the streets, public landings, and places permanently dedicated to public use, the right of the city to which is rather that of administration than of ownership, involving the *jus disponendi*, as such streets, landings and public places can not be lawfully diverted to other than the public uses to which they are dedicated. Respondent says that the character of the

property described in the bill as the property of the city of New Orleans, and claimed to be subject to drainage assessments for which it is charged, that the city is directly liable to the amount in the aggregate of about $677,932.90, is such as to exempt it from all such liability, and from all liability to be assessed or taxed for any purpose, being lands occupied by streets, landings, squares, parks and other public places, and by the court houses, occupied and used by the State and municipal courts, the municipal or city hall, the parish and police jails, school houses, engine houses and other structures, and buildings dedicated to public and corporate uses, and essential to the discharge of the public, police and governmental functions of the municipality, as a political subdivision of the State government.

Respondent says that exemption from assessment and taxation is implied in all cases of public property, and that it is always to be presumed that the general language of statutes is made use of with reference to taxable subjects, and that the property of municipalities is not in any sense taxable, and is, by clear implication, excluded from all assessment and tax laws; and, respondent says, it is manifestly implied in all of said statutes hereinbefore set forth, that the streets and landings and public places, and property of the city dedicated to necessary corporate uses for purposes of education, police and municipal government, were not intended to be embraced within the purview of the said several acts authorizing the said drainage assessments, from the fact that all lands intended to be subjected to such assessment are, by the terms of said act subjected to special liens and mortgages and to the liability to be seized and sold under execution for the enforcement of said assessment, which provisions, plainly, could never have been designed to embrace the streets, landings and public places of the city and its property dedicated to educational, police and governmental uses; and this, respondent says that the assessment of such property upon said assessment rolls is entirely without warrant of law and can not be enforced in this proceeding or otherwise.

And this respondent denies all and all manner of unlawful combination or confederacy, wherewith it is by the said bill charged, without this, that there is any other matter,

cause, or thing, in the said complainant's said bill of complaint contained, material or necessary for this respondent to make answer unto, and not herein, well and sufficiently answered, traversed and avoided or denied, that is true, to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove, as the court shall direct, and respectfully prays to be hence dismissed with costs.

(Signed) W. H. ROGERS,
City Atty., Solicitor for Def't.

Pleadings.

In the case of James W. Peake vs. City of New Orleans, No. 11,614 of the docket of the U. S. Circuit Court, Eastern District of Louisiana.

Made part of, and referred to in, bill of complaint.

Bill in Chancery.

Filed August 10, 1887.

To the Judges of the Circuit Court of the United States for the Eastern District of Louisiana:

James Wallace Peake of the city of New York and a citizen of the State of New York brings this his bill on his own behalf as well as on behalf of all other parties holding obligations of the same nature and kind as your orator or obligations that are susceptible of being reduced to the same nature and kind as your orator's who may intervene for their interest herein and may contribute to the costs and expenses of this suit, against the city of New Orleans, a municipal corporation created by the statutes of the State of Louisiana, and a citizen of said State.

And thereupon your orator complains and says:

That by Act No. 165 approved March 18th, 1858, the Legislature of the State of Louisiana provided for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson of said State, the limits of which were fully described in the 1st section of said act and which were respectively divided into three draining districts, and these were respectively designated as the First, Second and Third Drain-

ing Districts, and to which by a subsequent act of the Legislature (which will be referred to hereinafter) and the district called the Fourth Draining District was added; that 2nd section of said act for the purpose of carrying out the provisions of said act it was provided for the appointment of a board of commissioners for each of said districts, who were by the fourth section of said act invested with all the rights and powers necessary to drain said several draining districts; and to that end they were authorized at all times to enter the lands within said districts to place engines and machinery thereon and to dig all necessary embankments and levees, and generally to do all things necessary to be done in draining, cleaning and reclaiming the lands within said districts; and by the fifth section of said act saidboard were each authorized to sue and be sued.

And your orator further shows that by the seventh section of said act said boards of commissioners were empowered to levy, drain and reclaim the lands in their respective districts as follows, to-wit: whenever either of said boards of commissioners were ready and prepared to drain their respective sections or districts such board was directed to cause a plan thereof to be made, accurately designating the limits of the section or district to be drained as far as possible, the subdivisions of property therein contained, and the names of the proprietors, also the dimensions and directions of the canals to be dug, and the place where the steam engines would be placed, which plan or plans were to be deposited in the office of the Recorder of Mortgages of the parish in which the section or district to be drained was situated, and notices were directed to be inserted in French and English in two newspapers, once a week, for four successive weeks, announcing that said board of commissioners would proceed to drain such sections, and describing the place where the plan thereof was deposited, accurately defining the limits thereof, and indicating as nearly as possible the time when the draining thereof would be completed, and the probable cost of the work; and said section further provided that after the publications aforesaid, that said Boards of Commissioners should apply by petition to one of the District Courts in the parish of Orleans for the portion of

the section or district lying within the limits of said parish, and to the District Court in the parish of Jefferson, for that portion of the section or district lying within said parish, which court or courts were directed upon due proof having been made of the publications of the notices aforesaid, to decree that each portion of the property situated within said limits was subject to a first mortgage lien and privilege in favor of such boards of commissioners for such an amount as might be assessed upon such section or district, and interest thereon at six per cent. per annum from demand thereof, which decree of the District Court of the parish of Orleans was directed to be recorded in the office of the recorder of mortgages in and for said parish, and the decree of the District Court for the parish of Jefferson was directed to be recorded in the office of the recorder of said parish, which lien, privilege and first mortgage it was further declared by said section should take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and should attach to such property until the amount assessed and the interest thereon should be paid in full.

And your orator further shows that by the eighth section of said act said boards of commissioners, each within its respective district or section was given the right and authority and power to levy such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board, to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act as applicable to its particular district, which assessment was to be collected, from time to time, as the wants of such boards might require; and the ninth section of said act provided that for the non-payment of the amount of said assessment judgment therefore should be recoverable before any court of competent jurisdiction, and the lands so assessed should be sold according to law.

And your orator further shows that an act supplementary to the above Act No. 165, approved March 18, 1858, was duly passed by the Legislature of Louisiana and approved March 17, 1859, being No. 191 of that year, by

which it was enacted in the first section thereof that to enable said Boards of Commissioners to carry into effect the provisions of said Act No. 165 approved March 18, 1858, and to commence the work therein contemplated, that each of said Boards of Commissioners should have power and authority to issue bonds in the sum of $500, each having not more than thirty years to run and bearing interest not exceeding 8 per cent. per annum, to be designated "Draining Bonds," which bonds were not for any one draining district to exceed $350,000, and by the second section of said supplementary act it was provided that it should be the duty of said Boards of Commissioners upon issuing the bonds aforesaid, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of such board or boards in accordance with the provisions of the aforementioned original act approved March 18, 1858, and fix and apportion the amount to be paid yearly by the owners of said lands in order to pay the annual interest on said bonds, and such bonds as might mature, and the manner of redeeming said bonds was provided for in other sections of said act.

And your orator further shows that the Legislature of the State of Louisiana by an act approved March 1, 1861, being No. 57 of that year, and entitled an act to provide fort he "collection of theassessments for draining under the acts of March, eighteen hundred and fifty-eight and act supplementary thereto of March seventeenth, eighteen hundred and fifty-nine" enacted that the amount of assessment which the boards of commissioners of the several draining districts were authorized to affix and apportion to be paid yearly by the owner or owners of the land within said districts, in order to pay the interest on the bonds issued or to be issued by said boards of commissioners and such bonds as might mature by virtue of the second section of said supplementary Act No. 191, approved March 17, 1859, should be collected and sued for as follows, to-wit: As soon as any assessment had been made notice thereof should be given, a copy thereof should be filed in the Third District Court of New Orleans, for all the assessments made on the property within the limits of the parish of Orleans, and in the Third Judi-

cial District Court sitting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, and on which tableau of assessment thus to be filed the property assessed should be set forth with the amounts assessed and the names of the owners thereof, if known, and if the owners names were not known, then it should be stated in said assessment roll that the property assessed belonged to owners unknown that a petition should be filed with said assessment roll, praying for an order that all persons whom it might concern, do show cause within thirty days from the first publication of said order, if any they had, why said assessment roll should not be approved and homologated; that said order thus rendered should be published in the French and English languages, at least twice a week for thirty days, in one newspaper published in New Orleans as to the order of the Third District Court of New Orleans and in one newspaper published in the parish of Jefferson as to the order of the Third Judicial District Court sitting at Carrollton, and that after said publications, the said courts should on motion of counsel of said boards of commissioners, approve and homologate said assessment rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings, and that the court should at the same time and in the same judgment order the delinquent parties to pay ten per cent. in addition to the amount assessed to pay costs and counsel fees.

And your orator further shows, that afterwards, to-wit: in the year 1871 the Legislature of the State of Louisiana by Act No. 30 of that year, authorized and empowered the Mississippi and Mexican Gulf Ship Canal Company, a corporation then existing and domiciled in the city of New Orleans to excavate drainage canals and build protection levees, within the then limits of New Orleans and Carrollton, and certain terms and conditions expressed in said act, and by the second section thereof said company was authorized and empowered to dig a canal and with the earth removed from the same to build outside of said canal a protection levee in the rear of the city of New Orleans and near the shore of Lake Pontchartrain, the

exact location of said canal and levee and all canals to be dug and levees to be built by said company, to be designated and fixed by the board of administrators of said city of New Orleans; and by the sixth section of said act it was made the duty of the said board of administrators of the city of New Orleans immediately after the passage of said act, not only to locate the lines of the canals and protection levees specified in the various sections of said act, but they were also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain and to keep the water in the canals in process of excavation as far as practicable at a proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and by the eighth section of said act it was made the duty of the city surveyor of New Orleans, or an engineer appointed by said board of administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company during each month, and upon measurement of the width and depth of the canal or canals or parts of canals dug and protection levees built, to certify as to the number of cubic yards excavated, and the number of cubic yards of protection levees built during said month, and that it should be the duty of the administrator of accounts, on the presentation to him of said certificate of the city surveyor or engineer appointed as aforesaid to draw a warrant or warrants on the administrator of finance in payment of the work so done at the rate of fifty cents per cubic yard for excavation and fifty cents per cubic yard for the protection levees built, the said warrants to be of such denomination as might be required by the president of said company and these warrants it was the duty of the Administrator of Finance to pay on presentation to him in case there was any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company, but should there not be sufficient funds to cash said warrant or warrants, then the Administrator of Finance was by said act required to endorse upon the same the date of presentation, after which date the said warrant or warrants bore interest at the rate of 8 per cent. per annum

until paid; and by the ninth section of said act it was enacted that in order to provide funds for the payment of the work to be done by the said company, that the three boards of commissioners for the draining districts of New Orleans and Jefferson established under the acts of March 18, 1858, March 17, 1859, and the several acts amendatory thereof, and any and all other person or persons or corporations, who might have been in possession should transfer to the Board of Administrators of New Orleans all money, assessments and claims for drainage in their hands, or under their control, all titles to real estate, all books, plans, tableaus and judgments in favor of commissioners the office furniture of said drainage commissioners, *a true statement of the claims of drainage commissioners against the city of New Orleans* to be adjudicated and settled out of the money collected by the city of New Orleans, and pertaining to said drainage districts, and that the Board of Administrators of New Orleans should be and were thereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of said several drainage districts or any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; and the said Board of Administrators were directed to collect from the holders of property within said drainage districts the balance due on the assessments as shown by the books of the First, Second and Third Drainage Districts, under acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, and which assessments were thereby confirmed and made exigible, and further to make assessments of two mills per superficial foot in those parts of the three draining districts as existing and created by the said acts of March 18, 1858, and March 17th, 1859, and amendments thereto, and on such other lands as should be brought within the protection levees contemplated by said Act No. 30 of 1871, where no assessments had been made, and to execute and enforce the same as provided by the several acts of the Legislature creating and regulating said Boards of Draining Commissioners, and that all moneys received by the said Boards of Administrators from the said Commissioners of Draining Districts, the collection

of claims for drainage then due, from the collection of assessments, and from any of the sources of revenue contemplated by the provisions of the aforesaid Section No. 9 should be placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company and be held as a fund to be applied *only* to the drainage of New Orleans and Carrollton (as a whole, and which was a virtual consolidation of all of said draining districts and the additional territory brought within said protection levees), in accordance with the provisions of said act, and that all money so received should be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, *pro rated* that the rights, powers and faculties possessed and enjoyed by said Board of Administrators of New Orleans relative to drainage, should be so construed as not to conflict with the rights and faculties acquired by said company in excavating canals and building levees as stipulated in the various sections of said act; and the twelfth section of said act further provided that said act should be favorably construed, so as to favor all the purposes and objects of the same and the operations of the provisions thereof. All of which will more fully appear from all of the aforementioned acts which are made part hereof.

And your orator further shows that on the 7th day of February, 1872, under and pursuant to said Act No. 30 of 1871, said board of administrators of the city of New Orleans adopted an ordinance creating the Fourth Draining District, as will more fully appear by reference to a copy thereof herewith filed and made part hereof and marked "Ordinance 1359."

And your orator further shows that said board of draining commissioners were duly appointed, qualified and organized and entered upon the discharge of the duties imposed upon them by the various acts of the Legislature hereinbefore referred to, and pursuant to said acts respectively prepared, filed and deposited in the office of the recorder of mortgages of the parishes wherein the lands to be drained were situated their plans designating therein the lands to be drained, the subdivisions of property therein contained, the names of the proprietors, the dimension and direction of the canals and the places where the engines were to be located; and after due pub-

lication of the notices as required by said acts that the said commissioners would proceed to drain said lands, naming the place of deposit of plans defining the limits of the lands to be drained, and including as nearly as possible the time required for the completion and probable cost of the drainage and on the petition of said commissioners, decrees were rendered by the District Courts designated by said acts, that such portion of said property within the limits of the section or district to be drained exhibited by the plans was subject to a first lien and privilege in favor of said commissioners, for such amounts as might be assessed upon said property for its part of the costs of such drainage with interest thereon at six per cent. per annum from demand; said judgments or decrees, the courts rendering the same, the dates of rendition and the title of the proceedings are as follows, to-wit:

The judgment "In the matter of the Commissioners of the First Draining District praying a decree of mortgage, privilege," etc., duly rendered by the Honorable the Third District Court of New Orleans on the 24th of August, 1861; the judgment "In the matter of the Board of Commissioners of the Second Draining District praying for a decree of mortgage privilege," etc. duly rendered by the Honorable the Third Judicial District Court of Jefferson in suit No. 1938 on the docket of that court, and signed on the 29th of April, 1861; the judgment "In the matter of the Board of Commissioners of the Second Draining District praying," etc. duly rendered by the Honorable the Third District Court of New Orleans and signed on the 9th of February, 1861; the judgment "In the matter of the city of New Orleans praying for a decree of mortgage privilege," etc. upon property in the Third Draining District (said city acting as subrogee under said Act No. 30 of the Legislature of the session of 1871) duly rendered by the Eighth District Court, parish of Orleans and signed on the 4th day of May, 1872; and the judgment "In the matter of the Board of Administrators praying for a recognition and recovery of assessments in the Fourth Draining District" (said Board of Administrators herein also acting as transferee and subrogee under said Act No. 30 of 1871) duly rendered by

the Superior District Court parish of Orleans, in suit No. 807 on the docket of said court on the 29th day of January, 1873, and signed on the 3d day of February, 1873, copies of which judgments are herewith filed and made part hereof and marked "A," "B," "C," "D," "E."

And your orator further shows that under the authority conferred by said acts the Board of Commissioners of the First Draining District on the 12th day of September, 1861, levied an assessment of 3 3-10 mills per superficial foot on the lands within said district to pay the cost of drainage directed by said acts; that on the 11th of March, 1861, the Board of Commissioners of the Second Draining District levied an assessment of two mills per superficial foot on the lands of said district to pay said costs of drainage of said lands under the same authority; that on the 11 of June, 1872, the Board of Administrators of the city of New Orleans, then vested with the power to make assessments by virtue of said Act No. 30 of 1871, levied an assessment of two mills per superficial foot on all the lands within said Third District to pay the said costs of draining said lands; and or or about the 20th of November, 1872, the said Board of Administrators in the exercise of the authority conferred by said Act No. 30 of 1871 levied an assessment of two mills per superficial foot on lands within the aforesaid Fourth Draining District to pay the expenses of draining the same. All of which will more fully appear by reference to the resolutions of said Boards of Commissioners, and ordinances of the Common Council of said city of New Orleans, as transferee of said Boards of Commissioners, copies of which are herewith filed and made part hereof and marked respectively, "Assessment 1," "Assessment 2," "Assessment 3" and "Assessment 4."

And your orator further shows that the tableau or assessment rolls exhibiting the amounts assessed for such drainage, the names of the owners of the lands as known, and where unknown stating the owners to be unknown, were duly filed in the courts hereinafter named, in accordance with the provisions of the acts of the Legislature of the State of Louisiana, and on motion and after due publication of said orders, that all persons concerned show cause why such assessments should not be approved

and homologated, said tableaux or rolls of assessment were duly homologated and approved by the judgments of said courts, which, by the terms of said Act No. 57 of 1861, were and are now judgments against the aforesaid lands, as well as the owners thereof, for the amounts assessed and 10 per cent. costs and counsel fees; and said judgments, the titles of the proceedings, the courts rendering the same and the dates of rendition, are as follows, to wit:

"In the matter of the Commissioners of the *First* Draining District, praying," etc., No. 29,935 Superior District Court, parish of Orleans; the judgment homologating the assessment rolls for said district was rendered on the 21st of March, 1874, by said Superior District Court for the parish of Orleans.

"In the matter of the Commissioners of the *Second* Draining District, praying," etc., No. 1938, the judgment homologating the assessment roll of said district *above* Toledano street was rendered by the Second Judicial District Court for the parish of Jefferson, on the 15th and signed on the 23d March, 1869.

"In the matter of the Commissioners of the *Second* Draining District praying," etc., No. 25,393, the judgment homologating the assessment rolls of said district *below* Toledano street was rendered by the *Third* District Court for the parish of Orleans on 11th, and signed on the 18th November, 1868.

"In the matter of the Commissioners of the Third Draining District praying," the judgment homologating said assessment roll for said district was rendered on the 8th and signed on the 13th November, 1872, by the Eighth District Court for the parish of Orleans.

"In the matter of the board of administrators praying," etc., No. 807, the judgment homologating the assessment for the *Fourth* Draining District was rendered on the 15th and signed on the 18th of March, 1873, by the Superior District Court for the parish of Orleans; said tableaus or assessments are specially referred to for fuller explanation and greater certainty, and copies of said judgments are herewith filed and made part hereof, and marked "A 1," "B 1," "C 1," "D 1" and "E; all of said courts so rendering said judgments having become possessed of

jurisdiction over said matters under authority conferred on them by the State of Louisiana subsequent to said Act No. 57 of 1861.

And your orator further shows that said Board of Administrators of the city of New Orleans complied with said Act No. 30 of 1871, and took possession of all the money, rights, privileges, properties and powers conferred on them and became possessed of the means necessary to carry out the objects of the statutes aforesaid, and provide for the payment of all the drainage warrants that might be issued under said Act No. 30 of 1871.

And your orator further shows that said Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden (who became subsequently the transferee of said company and who had been duly recognized as such by the Legislature of the State of Louisiana prior to the issuance of the drainage warrants sued on by your orator and reduced to judgment as hereinafter stated) proceeded under the authority conferred under said Act No. 30 of 1871 with said drainage work, excavated canals, built protection levees and provided and ran all the machinery necessary for the full and complete accomplishment of the work and generally did and performed all that was required of them by said act until June, 1876, by which time fully two-thirds or more of the work contemplated by said Act No. 30 of 1871 and as designated thereunder by the Board of Administrators of the city of New Orleans had been completed, and received from said city of New Orleans in pursuance of the provisions of said Act No. 30 of 1871 warrants payable out of said taxes, assessments and judgments for a very large sum (the amount of which is unknown to your orator) and for the payment of which all of said taxes, assessments and judgments and other assets were expressly pledged.

And your orator further shows that he is the holder and owner of a certain judgment based on three of the above named drainage warrants issued under and in pursuance of the above Act No. 30 of 1871 for work and labor done by the said Mexican Gulf Ship Canal Company and said W. Van Norden, transferee thereof under the provisions of said act, and measured and accepted by said city of New Orleans for the sum of two thousand dollars each,

numbered 115, 116 and 122 and all dated July 9, 1875, with interest at eight per cent. per annum from date, and each of which was legally and formally issued by J. G. Brown the then Administrator of Public Accounts of the said city of New Orleans, for the amount of money therein set forth, and each of said warrants was on the day of the date thereof presented to Edward Pilsbury, the then Administrator of Finance of said city of New Orleans, and said presentation was by him acknowledged in writing, and the same were legal contract obligations of the said city of New Orleans, to pay the amount thereof and the interest therein stipulated, and which warrants were respectively made payable to the order of said W. Van Norden, transferee of the said Mexican Gulf Ship Canal Company, who endorsed the same, whereby they became negotiable and transferable by delivery, and as such your orator acquired the same, and said W. Van Norden was at the time of the institution of the suit in which said judgment was rendered, and now is, a citizen of the State of New York and could then and now maintain an action on said warrants in this Honorable Court for the recovery of the amount thereof; which judgment was rendered in suit No. 10,810 on the docket of this Honorable Court and entitled James W. Peake vs. The City of New Orleans, on the 9th day of May, 1887, upon which execution issued on the day of , 1887, which was after due demand on defendant by the marshal of this Hon. Court returned by him *nulla bona*, as will more fully appear by reference to the record of said suit, judgment, execution and return thereon, and all made part hereof.

And your orator further shows that in the contract made by the State of Louisiana for the city of New Orleans with the Mexican Gulf Ship Canal Company as embraced in said Act No. 30 of 1871, there was a direct and positive trust and obligation imposed on said city of New Orleans to collect said drainage taxes, assessments and judgments at that time outstanding and due and to make assessments of two mills per superficial foot in those parts of said three draining districts theretofore created, and on such other lands as should be brought within the protection levees contemplated by said act where no assessments had been made and to collect the same and place

all such collections to the credit of said Mississippi and Mexican Gulf Ship Canal Company, to be applied only to the drainage of New Orleans and Carrollton, which obligations and trust said city of New Orleans assumed and accepted and thereby guaranteed and warranted to perform all the said obligations and duties imposed on her by said act and especially said duty of placing all of said collections to the credit of said Mississippi and Mexican Gulf Ship Canal Company and applying the same solely to the drainage of New Orleans and Carrollton.

And your your further shows that said city has collected said drainage taxes, assessments and judgments to a very large amount from various parties owing the same, but the amount thereof and the names of the parties from whom the same were collected are unknown to your orator, but disregarding her duties and obligations and warranties aforesaid has applied a very large amount of said collections to purposes not contemplated by said Act No. 30 of 1871, and in violation thereof, and among others as follows:

First: The sum of $18,699.66 set forth in detail in Exhibit marked "Account No. 1" not one cent of which was ever placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company or paid in accordance with any of the provisions of said Act No. 30 of 1871 although collected thereunder.

Second: Three thousand dollars paid in January, 1874, to James J. O'Hara, whose relations with said city are set forth in the document herewith filed and made part hereof and marked "Contract 1," and which was paid under a certain compromise made between said O'Hara and said city of New Orleans, a certified copy whereof is filed herewith and marked "Compromise 1."

Third: Five hundred dollars paid about January, 1874, to P. E. Boyer, transferee of the firm of H. & C. Tyler, for coal for running the draining machines of the city of New Orleans, which it was declared in said Act No. 30 of 1871 should be run by said city of New Orleans.

Fourth: Seven thousand five hundred and two 57-100 dollars collected by said city as attorney's fees in the Third Draining District, which it was decided in the case of Lacy vs. Waples and the City of New Orleans (28 La.

Ann. p. 158) belonged to said city of New Orleans as part of said drainage fund, and of which sum three thousand and fifty-three 80-100 dollars has been illegally and improperly paid out by said city on the dates and to the parties spec fied in exhibit hereto annexed and made part hereof and marked "Account No. 2," leaving a balance due to the credit of said account which should be paid to your orator and parties similarly situated.

Fifth: Ten thousand dollars and upwards, the precise amount not being known to your orator, collected by said city as attorney's fees in the First Draining District and paid out as such to Geo. S. Lacy and others who rendered said services as city attorneys, and who in accordance with the above decision in Lacy vs. Waples et al., were not entitled to such fees, but the same belonged to said city as part of the drainage fund created by the acts hereinbefore referred to.

And your orator further shows that said city of New Orleans, from the 27th day of July, 1872, to the 9th of January, 1873, collected in cash in said First Draining District $1546.03; in said Second Draining District $3,398.85; and in said Third Draining District $1,939.95 making a total of $6,884.83 of drainage taxes collected during said time for which said city released and discharged the individuals and lands against which the same were levied and assessed, which she never deposited or placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company and never paid out for any purposes contemplated by said Act No. 30 of 1871, and with which she is now chargeable with interest from the date of collection.

And your orator further shows that from December 31, 1873, up to June 3d, 1881, said city of New Orleans in utter disregard of the obligations imposed on her as aforesaid and without any authority whatever therefor received in full payment and satisfaction of drainage, taxes, assessments and judgments imposed and rendered as aforesaid, drainage warrants, amounting to $214,440.95 a full and detailed account whereof is set forth in exhibit herewith filed and marked "Account No. 3" for which amount said city is chargeable with interest.

And your orator further shows that by the purchase by

the city of New Orleans on the 7th day of June, 1876, of the boats, franchises and property of said Mexican Gulf Ship Canal Company and its transferee, as hereinafter described, said city of New Orleans in her corporate and municipal capacity became the absolute owner and proprietor of said property so purchased and held and owned it for the sole use and benefit of said city and was thereafter in duty bound to continue said drainage work, dig canals and bui'd protection levees until said drainage was fully completed, and collect the taxes, assessments and judgments out of which all of said drainage warrants were to be paid, free of any claim or charge whatever therefor which fact was so well recognized and understood at the time of said purchase, that there was a provision incorporated in said act of sale, providing a bureau of drainage should be created with an office in the City Hall at New Orleans with a book-keeper at a salary of $200 per month and a collector at a salary of $300 per month payable out of drainage assessments and 2½ per cent. commissions on the amounts of taxes collected out of which said collector was to pay all attorney's fees, costs, expenses, clerk hire and stationery and to the obligations of which said Van Norden, transferee as aforesaid individually and as a holder of drainage warrants undertook to bind all warrants so held by him as will more fully appear by reference to said act of sa'e hereinafter described.

And your orator further shows that under the terms of the above stipulation in said act of sale and transfer said city of New Orleans has paid W. T. Mayo, book-keeper a sum exceeding twenty-four thousand dollars and to James B. Guthrie a sum exceeding twenty-five thousand dollars, and your orator shows that the warrants upon which his aforesaid judgment is based had passed from the possession and control of said Van Norden long prior to the date of said sale and transfer of June 7, 1876, and the same were not bound, nor is your orators said judgment based thereon bound by any stipulation in said agreement (and your orator is informed and believes that all of said warrants issued for work done, performed and accepted by said city of New Orleans, amounting to $325,000 and upwards were also at the date of said sale and transfer,

not held or controlled by said Van Norden) and as to this class of warrants which were all issued and dated prior to said sale and transfer, and any and all judgments based thereon, said payments to said Mayo and to said Guthrie, were illegal and improper and said city is bound to account to the holders of said class of warrants and judgments based thereon for said payments so made to said Mayo and Guthrie as aforesaid.

And your orator further shows that he is informed and believes there are many more cases of unauthorized payments and waistings of said drainage fund but the dates and parties to whom paid are at present unknown to him as will more fully appear by reference to a compromise thereof attempted to be made by said city and said Van Norden in said act of sale of June 7, 1876, and hereinafter referred to as aforesaid.

And your orator further shows that by Act No. 16 of the Legislature of Louisiana approved February 24, 1876, and made part hereof, the city of New Orleans was authorized and empowered, to contract with said Mississippi and Mexican Gulf Ship Canal Company and said W. Van Norden, transferee thereof for the purchase of its rights and said Van Norden's rights, franchises, tools, implements, machines, boats, and apparatus, the purchase price to be paid in drainage warrants payable out of drainage assessments imposed under previous acts, and on the 7th day of June, 1876, said purchase was made, by notarial act a copy of which, as well as of the inventory of the goods sold is herewith filed and made part hereof, and marked "Transfer 1" and "Inventory 1," the said city receiving from said company and its transferee said machines, boats, and apparatus and implements of great value, for which it agreed and bound itself to pay $300,000 in drainage warrants with $20,000 additional in pretended compromise of misappropriation of funds as aforesaid to be enforced and collected by said city of New Orleans, which warrants were accordingly delivered to the said Van Norden, transferee as aforesaid, and ever since said city has had possession and enjoyment of said property, wholly disregarding its obligations to pay for the same, as is more fully stated hereafter; that by such act the city of New Orleans assumed entire charge of

said drainage work, undertook to carry it on. Avail itself of the work done by said company, which in compliance with all of its obligations had dug and excavated canals and built levees and performed services requisite to said drainage work up to the time of said sale and transfer on said 7th day of June, 1876, when from two-thirds to three-quarters of all the work contemplated by said Act No. 30, of 1871, and as designed thereunder by the Board of Administrators of New Orleans, had been completed; that the work so due by said company and its transferee was in all respects conformable to the acts of the Legislature and the designs and directions of said Board of Administrators and was adequate to secure the drainage proposed, requiring of course proper efforts on the part of the city of New Orleans to maintain the work already done, and to go on and prosecute the same to its final completion, which it became its sole right and duty to do after said sale and transfer as aforesaid; and all of said drainage warrants issued as aforesaid for actual work and labor done by said company and measured, approved and accepted by said city of New Orleans, and all judgments based thereon are first entitled to the benefits of and to be paid out of said assessments, liens, privileges, mortgages and judgments and especially the judgments against the city of New Orleans hereinatter specially described, and next, all of said warrants issued for said property bought received and enjoyed by said city but not paid for, and all judgments based on said last named warrants are entitled to the benefit of and to be paid out of said assessments, liens, privileges, mortgages and judgments aforesaid.

And your orator further shows, that all of said warrants were in the same form, except as to amounts and dates and were negotiable, were secured by all said drainage assessments and judgments, pledged for their payment and by the obligations of the city of New Orleans imposed by law, as well as by the express assumption of said city to collect and apply the funds derived from all of said drainage assessments and judgments therefor, to the payment of all of said warrants in the order aforesaid and on the faith of said obligations of the city of New Or-

leans and of these securities your orator for actual value given by him therefor acquired the warrants hereinbefore described and upon which your orators aforesaid judgment is based as aforesaid.

And your orator further shows that he is informed and believes there are now outstanding for work actually done, measured and accepted by the city of New Orleans, warrants exceeding in amount $325,000, which are in addition to the above $320,000 issued for the purchase of the franchise tools, etc., as aforesaid.

And your orator further shows that the decrees of the court aforesaid subjecting the lands to be drained to the first mortgage lien and privilege to secure said assessments assessed for drainage, and homologating said assessment rolls, constituting personal judgments against the owners of the land as well as against the land for the amounts assessed have been duly recorded in the office of the Recorder of Mortgages of the parishes of Orleans and Jefferson according to the situation of the lands, and within ten years from the rendition and recordation thereof have been reinscribed, and are mortgages against the lands and the owners thereof to secure said assessments; and proceedings have been instituted in the State courts by the city of New Orleans as transferee and subrogee aforesaid within ten years from the rendition thereof to revive said judgments homologating said assessment rolls and constituting personal judgments as aforesaid; and in the Second Draining District for the parish of Jefferson said judgment was at the suit of the city of New Orleans transferee and subrogee aforesaid duly revived by a judgment of said Second Judicial District Court rendered on the 9th and signed on the 18th day of April, 1879, as will more fully appear by reference to copies of said proceedings made part hereof and filed with "A 1," "B 1," "C 1," "D 1."

And your orator further shows that subsequent to the issue of said warrants and the assumption by the city of said drainage work the Legislature of Louisiana passed certain laws to exclude certain lands from all liability for the said assessments, to annul the judgments therefor, cancel all liens, mortgages and privileges securing said assessments, and finally there is incorporated in the present

charter of the city of New Orleans an enactment to repeal all the laws for the drainage of said city and forbidding the collection of said drainage assessments all of which will more fully appear by reference to the Acts of the Legislature No. 48 of the year 1877, No. 67 of the year 1877 and No. 20 section 42 of the year 1882, all of which are made part hereof, and specially referred to for fuller explanation and greater certainty.

And your orator further shows that the legislative acts under which said warrants issued pledging said taxes, assessments and judgments for their payment were in legal effect contracts under which the holders of said warrants and judgments rendered thereon, were entitled to the benefit of all securities as well as of the fulfillment of the obligations of the city of New Orleans to enforce said taxes, assessments and judgments thereon; that said legislative acts, to-wit: No. 48 of 1877, No. 67 of 1877 and section 42 of Act 20 of 1882 propose to liberate the lands, the owners thereof and said city of New Orleans from all liability to the holders of said warrants and judgments based thereon, and to destroy all the securities pledged for the payment of said warrants and judgments based thereon and said acts further propose to discharge said city from all its obligations to pay the price of the property acquired by it under its contract of purchase of the 7th of June, 1876, to be paid out of said drainage assessments and judgments which said city by its contract bound itself to collect and enforce; that in effect these legislative acts design to destroy the right of property of your orator in said drainage assessments and judgments, free all parties from liability, cancel all securities on the lands, and deprive your orator and other parties similarly situated of all means of payment of said warrants and judgments based thereon, created by said city of New Orleans under the pledge of the grant and securities hereinbefore set forth.

And your orator further shows that said legislative acts and each of them are null, void and of no effect, for plain repugnancy to the Constitution of the United States and especially to the first article, section 10 and the fifteenth amendment of that instrument prohibiting all legislation impairing the obligations of contracts and protecting the

rights of property by which your orator's rights are secnred.

And your orator further shows that there is now due and uncollected drainage taxes, assessments and judgments exceeding one and a half millions in amount and that the city of New Orleans itself is a judgment debtor for drainage taxes and assessments levied upon lands exhibited on said assessment rolls for the various drainage districts and duly approved and homologated for the following sums, to wit:

In the First Draining District, with interest	$223,111 60
In the Second Draining District for that portion thereon situate in the parish of Jefferson, with interest	128,454 29
In the Second Draining District for that portion thereof situate in the parish of Orleans, with interest	71,431 18
In the Third Draining District, with interest thereon at six per cent. per annum from May 4, 1872	207,441 41
In the Fourth Draining District, with interest thereon at six per cent. per annum from January 30, 1873	65,956 00

making in the aggregate six hundred and ninety-six thousand three hundred and ninety-four 53-100 dollars exclusive of interest, counsel fees and costs allowed by said judgments which is unpaid and should be paid by said city of New Orleans to the satisfaction of your orator's said judgment and drainage warrants outstanding susceptible of being reduced to like judgments and interest thereon, as will more fully appear by reference to duly certified copies of said judgments and extracts from said assessment rolls only approved and homologated by the aforesaid judgments copies of which are herewith filed and marked "A 1," "B 1," "C 1," "D 1," "E 1."

And your orator further shows, that said judgment above set forth for $128,454.29 although rendered against the city of Jefferson, city of Carrollton, and the Police Jury of the parish of Jefferson, the same became a judgment against the city of New Orleans and a debt due by said city of New Orleans under section 34 of Act No. 7 of the Legislature of the State of Louisiana approved March 16, 1870, and the fifth section of Act No. 7 of the said Legislature of said State approved March 21, 1874, as will more fully appear by reference to said acts which are made part hereof.

And your orator further shows that the aforesaid judgments against said city of New Orleans were rendered

against her in suits instituted and prosecuted by herself and especially those based on assessments in said First, Third and Fourth Draining Districts, and that subsequent to the rendition thereof and in further recognition of the correctness thereof and her liability thereon said city has asked the courts for the revival thereof.

And your orator further shows that since said legislation of 1877 said city of New Orleans has failed to enforce said assessments and judgments neither paying what it owes itself or enforcing the liability due by others, nor has it complied in any manner with its obligations in the premises and shields itself under the illegal and unconstitutional acts aforesaid and said avowal and refusal among others was and is manifested in the ordinance of the Council of the said city passed on the 5th of April, 1881, and in the proclamation of the mayor of the said city published April 7th, 8th and 9th, 1881, copies of which are herewith filed and marked Ordinance No. 6970 and Proclamation No. 1 and made part hereof.

And your orator further shows that among those who appeared and opposed the homologation of the assessments in the First Draining District (which had been levied long prior to said Act No. 30 of 1871, but which were approved and homologated thereunder) was the estate of John Davidson, but after due hearing said assessment rolls were duly approved and homologated as aforesaid (see 27 Ann. p. 20 to 24), made part hereof and the judgment of the Supreme Court in that matter was duly affirmed by the Supreme Court of the United States (96 U. S. R. p. 69) and thereafter, and after said sale and transfer from said Mississippi and Mexican Gulf Ship Canal Company and said W. Van Norden, transferee, and after said city of New Orleans had failed and declined to go on and complete said drainage work, and after she had allowed some of the drainage boats so purchased as aforesaid to sink and rot, and had sold others, and thus rendered herself unqualified to complete the same, and publicly announced her determination not to do so, said estate of said John Davidson brought suit to have the aforesaid judgments against it annulled and set aside and said judgment in March, 1882, was

annulled on the ground that the same was prospective and based upon benefits to be rendered, that said benefits had not up to the time of the institution of said suit been rendered but injury had been done in consequence of the work as far as done, that the city of New Orleans had abandoned all drainage work and disposed of all drainage apparatus and become incompetent to resume said drainage enterprise and that thereforethere was a failure of consideration of said judgment which rendered it inequitable and unjust to enforce the same (see 34 Ann. p. 170 to 178 made part hereof.

And your orator further shows that the area of land to be reclaimed and drained under Act No. 30 of 1871 embraced all the lands in the three draining districts described in said Act No. 165 of 1858, and such additional lands as were brought within the limits of the protection levees contemplated by said Act No. 30 of 1871, and this territory, under said act as an entirety was to be drained and protected as follows, to wit: by a canal 50 feet wide and 15 feet deep to be dug from a point on the Mississippi river above Carrollton to Lake Ponchartrain, then along the shore of said lake to the lower limits of the city of New Orleans, and thence from said lake shore to the Mississippi river below said city, and with the earth removed from said canal, a protection levee was to be built on the outside of said canal one hundred feet wide at its base and of sufficient heighth to protect the land within the same from overflow, the said canal and protection levee together with the levee on the bank of the Mississippi river, to form a complete pro'ection from overflow of the lands within said limits; and said canal, on the inside of said protection levee, to serve as a reservoir for the drainage of New Orleans, and lands in the rear of said city, into which other canals contemplated by said act and located by said, were to empty; and from said reservoir canal the water was to be lifted and pumped into said Lake Pontchartrain by engines, drainage machines and apparatus to be placed, built and run by said city of New Orleans and at her expense, the whole constituting one entire system of drainage, the real benefits and advantages of which could only be realized by the completion of the

entire system; which canals, protection levees, and other canals contemplated by said act were to be and were located by said board of administrators of said city, and are exhibited on the map herewith filed and made part hereof, and marked "Drainage Map No. 1."

And your orator further shows that more than two-thirds of the work of said drainage system was completed at the time of the purchase of said city on June 7, 1867, as aforesaid; the canal and protection levee, from the Mississippi river above Carrollton to the shore of Lake Pontchartrain, and along said lake [to the bank of the New Canal at West End on said lake had been completed, as was also the canal and protection levee below said city of New Orleans, and about all the canals within the above area of territory had been dug and the old canals cleaned and deepened, leaving only to be built the canal and protection levee from West End to the point where said lower canal and protection levee joined the shore of said Lake Pontchartrain, and the pumps and apparatus to be bought placed in position and run by said city of New Orleans.

And your orator further shows that after said city became the owner of said franchise, boats and implements, and thus above authorized and fully equipped to complete said system of drainage as an entirety, according to the plan thereof, she wholly disregarded her duties and obligations, and declined and refused to proceed with said work, sold some dredge boats, tools and apparatus bought as aforesaid, and allowed others to rot as aforesaid, and suffered the work already done to remain useless and go to destruction by neglect, and your orator avers that the sole cause for the lack of the benefits conferred on said property of said Davidson's estate and damage thereto if any, and the sole ground for said Davidson decision was the refusal and neglect of said city to complete said system as an entirety and build and run the engines and apparatus to remove said drainage water from said reservoir canal, that the territory aforesaid might be fully and completely drained and protected from overflow, and she alone is responsible for said decision and the loss of the amount of said judgment which with interest thereon amounted to eighty thousand dollars

and upwards, and is chargeable therewith and accountable to your orator and other holders of judgments based on said drainage warrants and warrants susceptible of being reduced to like judgments.

And your orator further shows that he is informed and believes that very numerous other decisions have been rendered by the courts of Louisiana based on the same facts and grounds as the above Davidson decision (but the titles to the suits and the amounts therein involved are at present unknown to your orator) whereby very numerous drainage assessments and judgments based thereon have been annulled and set aside and the lands and the owners thereof released and discharged from all liability and all due to the fault, neglect and refusal of said city of New Orleans to complete the drainage work aforesaid whereby very large sums of money have become wholly lost to your orator and others similarly situated and for all of which and for all loss, waste and damages resulting from the non-fulfillment of its duty as aforesaid said city is accountable.

To the end therefore that it may be adjudged that the said acts of the Legislature of Louisiana, to-wit: No. 48 of 1877, No. 67 of 1877 and section 42 of Act No. 20 of 1882 are unconstitutional, null and void, that an account may be taken of all the drainage taxes, assessments and judgments imposed and rendered under Acts No. 165 of March 18, 1858, No. 191 of March 17, 1859, No. 57 of March 1st, 1861, and No. 30 of 1871, and the various acts of the Legislature supplementary thereto and amendatory thereof and of all moneys collected by said city of New Orleans under the aforesaid acts; and of any and all other assets and property that came to said city of New Orleans under the aforesaid acts or any of them as well as of each, any and all payments, disbursements and dispositions thereof; and that a further account be taken of all the loss, waste and damage caused by said city of New Orleans of or to said drainage taxes, assessments and judgments by reason of its illegal and wrongful acts of administration of the duties and obligations imposed on it under the above named acts of the Legislature, to-wit: No. 165 of 1858, No. 191 of 1859, No. 57 of 1861, and No. 30 of 1871 or any of them or by its failure to observe and carry

out said obligations, or from any other cause, and that the sum found to be due on said accounting with interest, may be decreed to be paid to your orator and other parties similarly situated who may avail themselves of the benefit of these proceedings and may offer to pay their share of the costs, expenses and counsel fees herein, and that your orator and said other parties similarly situated may have judgment against said city of New Orleans for the sum so found to be due as aforesaid, and that your orator may have such other and further relief and redress or both as may be proper and just in the premises.

May it please your Honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this Honorable Court, directed to the city of New Orleans therein and thereby commanding said city of New Orleans on a day certain therein to be named and under a certain penalty to be and appear before this Honorable Court then and there to answer, but without oath, which is waived, all and singular the premises, and to stand to, perform and abide such order, direction and decree as may be meet and agreeable to equity and good conscience, and your orator as in duty bound will ever pray.

(Signed) RICHARD DEGRAY,
ROBERT MOTT,
Solicitors for Complainant.

Answer.

Filed March 19, 1888.

Circuit Court of the United States, Eastern District of Louisiana.

JAMES W. PEAKE
vs.
CITY OF NEW ORLEANS. } No. 11,614.

This defendant, now and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for it to make answer to, answering, says:

1. That in the year 1858, the Legislature of Louisiana passed an act, being Act No. 165 of that year, entitled "*An act to provide for the leveeing, draining and reclaiming of swamp lands in certain portions of the parishes of Orleans and Jefferson.*"

That in the year 1859, the Legislature of Louisiana passed an act (being Act No. 191 of that year) entitled:

"An act supplementary to an act entitled, "An act to provide for the leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858."

That in the year 1861 the Legislature of Louisiana passed an act (being Act No. 57 of that year) entitled:

"An act to provide for the collection of assessments made under.

That the object of these acts was to provide for the drainage of the lands described and bounded in them, and to that end they created boards of commissioners to determine on and supervise the carrying out of the drainage works in the three districts into which the said lands were divided authorize said boards to levy an assessment or tax on the lands to be drained; and provided how said assessment or tax should be made a first mortgage and privilege on said lands, and how it should be collected.

All of which will more fully appear by reference to said acts as printed by authority in the acts for the years 1858, 1859 and 1861.

2. That said Act No. 57 of 1861 directed that when the said Boards of Commissioners had levied a drainage tax of so many mills per square foot, they should prepare a roll, showing the persons and property assessed and the amount assessed against each. That after due notice given of the preparation of this roll, and exposure thereof for inspection certain designated courts should on application of said board render a judgment homologating said rolls, and that this judgment of homologation should have the effect of a judgment against said property and the owners thereof. But that it was not intended that said judgment of homologation should have the force of a general personal judgment against said owners, but only that it should have the

force and effect of a judgment against the owners, restricted in execution to the particular property assessed.

3. That in 1871, the Legislature of Louisiana passed an act (being Act No. 30 of that year) entitled

"*An Act to Provide for the Drainage of New Orleans.*"

That in this act it was provided that the Mississippi & Mexican Gulf Ship Canal Company should, for a remuneration fixed in said act, construct the drainage works therein indicated and such other drainage works as should be fixed by the Board of Administrators of the city of New Orleans.

That said act further provided that for work done thereunder by said company and measured and accepted by the said Board of Administrators, warrants should be issued on the administrator of finance. That said administrator of finance should pay these warrants on presentation thereof to him, if he then had any money to the credit of said company; and that if he had no money to its credit, then the date of presentation should be endorsed on said warrants, and they should thereafter bear 8 per cent. per annum interest until paid.

That the said act further provided, that in order to secure a fund for the payment of said drainage works, the assets of the former Boards of Drainage Commissioners, including the assessments and assesssment rolls, made by them, and judgments in their favor, as also their claims against the city, should be transferred to said board of administrators. And said board of administrators were directed to collect the balance due on the levies and assessments made by said boards of commissioners, and to levy an assessment on the lands comprehended under said act, but not included under former acts. And the money thus collected was to be held by said board of administrators to the credit of said company, and for the payment of the above mentioned warrants.

Respondent shows, however, that the provisions in said act, which were afterwards construed to invest the said board of administrators with the powers conferred by said Act 57 of 1861 on the boards of commissioners were unconstitutional and void if they were intended to have that

effect, and that the pretended judgments of homologation mentioned in complainant's bill herein as obtained by said board of administrators under the said Act 57 of 1861, were null and void, and so held and decreed in the matter of Miss. & Mexican Ship Canal Co. vs. city of New Orleans, 35 An. p. 68; and by virtue and effect of this judgment the complainants are barred from claiming any relief in this proceeding by reason of said assessment and judgment and defendant hopes it may have the benefit of this defence as if it had availed itself thereof in the form of a plea to the same.

Respondent further shows that under none of the acts hereinbefore mentioned was any authority conferred on the board of commissioners, or on the board of administrators, to assess the city of New Orleans on its streets and public places, and that all assessments for drainage against said city on its streets and public property, were null and void.

Respondent further shows that the said Mississippi and Mexican Gulf Canal Company accepted the terms of said Act 30 of 1871 and began work thereunder. That under said Act 30 of 1871, the said company was entitled to look for payment for work done only from the fund therein provided; and that said fund embraced nothing beyond the drainage assessments legally made under said act and the uncollected balances of drainage assessments legally made under the act of 1858, above referred to. And your respondent further shows that no validity or force ever attached to Ordinance 1359 adopted February 7, 1872—the same was null and void and so declared by the Supreme Court of Louisiana in the cases known as Succession of Irwin and others 35 An. p. 68 and also in 33 An. and 34 An. p. 97.

Respondent further shows that for all work done by said company, under said Act 30 of 1871, and measured and accepted by said Board of Administrators up to January 1st, 1875, the said company was paid in full either in cash or by exchange of the drainage warrants issued under said Act 30 of 1871, for seven per cent. gold bonds of the city of New Orleans issued under Act 73 of the Legislature of Louisiana for the year 1872.

Respondent further shows that in 1872 the Legislature

of Louisiana passed an act (being Act No. 73 of that year) entitled an act to authorize the council of the city of New Orleans to levy a police tax" and for other purposes set forth in its title.

That under the 13th section of said act, the city of New Orleans was authorized to fund drainage warrants issued under Act 30 of 1871 into 7 per cent. bonds of the said city. That said Act 73 of 1872 did not purport to create any new indebtedness by the city of New Orleans, but only to provide for the funding of its existing indebtedness; that said act therefore, did not impose upon the city of New Orleans as its debt, the entire cost of the drainage done under said Act 30 of 1871; that the utmost which can be claimed is that said act may be construed as recognizing as a debt of the city of New Orleans, the till then utterly invalid and void assessments made against said city on its streets and public places; and that if said act did impliedly recognize and validate such previously invalid assessments against the city, it provided that the same might be paid and discharged by the issuance, in exchange for drainage warrants, of the bonds mentioned in said act.

Respondent further shows that under said act bonds on the city of New Orleans, of the face value of one million six hundred and sixty-five thousand dollars were issued to said Mississippi & Mexican Gulf Canal Company and its transferee Warner Van Norden, in exchange and as payment for drainage warrants issued to said company or to said Van Norden. That by the issuance and acceptance of said bonds in exchange and as payment for said warrants, the city of New Orleans paid more than double the amount assessed against it; that by such over payment the drainage fund became indebted to the city of New Orleans for at least the difference between the amount assessed against said city and the total sum paid.

Respondent further shows, that it is wholly immaterial whether the assessments against the city of New Orleans were or were not marked on the rolls or elsewhere, as paid, when said bonds were issued in exchange for said drainage warrants; that in fact the issuance and acceptance of said bonds in exchange for said warrants, did more than pay and discharge the indebtedness of the city

on account of said drainage assessments, if any such indebtedness ever in fact existed.

Respondent further shows, that it is not true that it has misapplied any money or sums whatever collected by it from the drainage assessments; that all money and sums whether collected by it from said drainage assessments have been applied in the manner directed by law.

Respondent further shows that by the constitutional amendment of the State of Louisiana of the year 1874, which went into effect on January 1, 1875, the city of New Orleans was prohibited from in any manner, directly or indirectly, increasing its indebtedness, and was also forbidden to issue any more drainage warrants, except payable out of drainage taxes, and not otherwise.

That said Act No. 16 of 1876, which purported to authorize the city of New Orleans to buy on credit, the drainage plant and implements, etc., of Van Orden, was null and void, as in contravention of said constitutional amendment.

Respondent further shows that all the drainage warrants now outstanding, were issued subsequent to January 1st, 1875, and are payable in terms as well as under the law, solely out of drainage taxes.

Respondent further shows that after the constitutional amendment of 1874, the said city of New Orleans was without authority to render itself liable for drainage warrants issued subsequent to January 1, 1875, and could not, either with or without the sanction of the Legislature, enter into any contract which could directly or indirectly, make the city liable for such warrants either by direct assumption or by failure to carry out such contract.

Further answering respondent shows that the said city of New Orleans has done all in its power to collect said drainage taxes and that the amount now outstanding and uncollected, was uncollectible. That if said uncollected taxes had been collected and paid to the holders of outstanding warrants, there would have been nothing left to carry on the drainage work with; and that if said collections had on the other hand been applied to the continuance of the drainage works, then there could have been nothing to pay the outstanding warrants with. That plaintiff's complaint that respondent has not proceeded with the work is therefore unfounded, as respondent has not been

provided with funds to continue said work. And further your respondent says that the right, title and interest of said Van Norden as transferee of the said Miss. & Mexican Gulf Canal Co. was declared null and void and in fraud as shown by the decree and judgment of the Supreme Court of Louisiana and referred to in 33 An. p. 804. That the property pretended to have been conveyed and sold by said Van Nordon were seized and sold by creditors of said Co. in suits of Willard and others as your respondent will show.

Respondent further shows that it has strenuously endeavored to collect all the unpaid balances on said drainage assessments rolls, and has exhausted all the remedies open to it in the effort to collect it; that the expenses of salaries to agents and book-keepers and other officials, and other expenses in collecting said taxes, were legitimate and proper expenses and were properly charged against the collections made.

Respondent finally shows that if through error of officials any portion of the collections made by it have been misapplied, which is denied, then such sum or sums are much more than compensated by the overpayments made by the city, by over issue of its bonds as hereinbefore stated, and that the result of an accounting will be to show that the drainage fund is largely in debt to the city of New Orleans.

And this respondent denies all and all manner of unlawful combination or confederacy, wherewith it is by the said bill charged, without this, that there is any other matter, cause or thing in the complainant's said bill of complainant contained, material or necessary for this respondent to make answer unto, and not herein, well and sufficiently answered, traversed and avoided or denied, that is true, to the knowedge or belief of this defendant; all which matters and things this defendant is willing and ready to aver, maintain and prove, as the court shall direct, and respectfully prays to be hence dismissed with costs.

(Signed) W. H. ROGERS,
City Atty., for Defendant.
WHITE & SAUNDERS,
H H. HALL,
For Bd. Liquidation.

Subpœna in Chancery.

Issued November 26, 1894.

UNITED STATES OF AMERICA.

The President of the United States, to the Marshal for the Eastern District of Louisiana—Greeting:

You are hereby commanded to summon the city of New Orleans to appear before the Honorable the Judges of the Fifth Judicial Circuit of the United States of America, at a Circuit Court to be holden on the first Monday of January, 1895, then and there to answer a bill in chancery, filed against it, wherein John G. Warner is complainant and said city of New Orleans is defendant.

Herein fail not, and have you then and there this writ, with your endorsement thereon how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 26th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and the 119th year of American independence.

(Seal) (Signed) E. R. HUNT, Clerk.

The defendant is hereby notified that it is required to enter its appearance in the clerk's office of the United States Circuit Court, on or before the first Monday of January, 1895, otherwise the bill may be taken *pro confesso*.

(Signed) E. R. HUNT, Clerk.

Marshal's Return.

Received by U. S. Marshal, New Orleans, November 26, '94, and on the 28th day of same month I served copy hereof on the city of New Orleans, La., by handing the same to Hon. John Fitzpatrick, Mayor thereof, in person, in the said city of New Orleans, La.

(Signed) J. V. GUILLOTTE, U. S. Marshal.
By JOHN EARLY, Dep. U. S. Marshal.

Appearance.

Extract from the Chancery Order Book,

Monday, January 7, 1895.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } 12,350.

Now comes the defendant herein, through E. A. O'Sullivan, city attorney, and Branch K. Miller, solicitors, and enters its appearance to the complainant's bill of complaint,

(Signed) E. A. O'SULLIVAN,
City Attorney,
By B. K. MILLER,
BRANCH K. MILLER,
Solicitors for Defendant.

Demurrer.

Filed February 4, 1895.

U. S. Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350.

The demurrer of the city of New Orleans, defendant, to the bill of complaint, of John G. Warner, complainant.

This defendant by protestation, not confessing or acknowledging all or any of the matters in and by the said bill of complaint set forth and complained of to be true in the manner and form as the same are therein, and thereby set forth, and alleged, says:

That it is advised, that there is no matter or thing contained in the complainant's bill of complaint, good and sufficient in law, to call this defendant to account in this Honorable Court for the same; but that there is good cause of demurrer thereunto; and it does demur thereunto accordingly, and for causes of demurrer to the said complainant's bill of complaint, in case the same were

true, which this defendant denies, and in no way admits, contains not any matter of equity whereon this court can ground any decree, or give the complainant any relief or assistance against it, this defendant, particularly for this:

That as appears by the bill of complaint and exhibits filed therewith, the complainant, as the assignee or transferee of Warner Van Norden, sues to recover the amount claimed to be due by the city of New Orleans, to the said Van Norden, as assignee or transferee of the Mississippi and Mexican Gulf Ship Canal Company, and to other holders of drainage warrants under the contract of said company by legislative act to drain the said city, and under an act of purchase, by which it is claimed that the city of New Orleans became liable to said Van Norden in his capacity of assignee or transferee of the said company, for the amount of the drainage warrants on which he sues; that complainant suing as assignee or transferee of said Van Norden, of rights and actions claimed to have been acquired by him as assignee or transferee, of the Mississippi and Mexican Gulf Ship Canal Company, this suit can not be maintained; that the said company being a corporation created by the laws of the State of Louisiana, and a citizen thereof, was, and is, incompetent to sue the city of New Orleans, also a citizen of the State of Louisiana, if no such assignment by the said company had been made; the acts of Congress defining and limiting the jurisdiction of this court, forbidding all suits in this court by assignees or transferee unless the original assignor or transferror, in this case the Mexican Gulf Ship Canal Company, could have brought this suit in this court.

And for further cause of demurrer, this defendant shows, that as appears by complainant's bill of complaint, all the warrants mentioned and referred to in said bill, and the payment of which the bill seeks, were drawn by the city of New Orleans a municipal corporation, and a citizen of the State of Louisiana, to be satisfied from and out of the drainage taxes, directed by the aforesaid legislative act to be levied for the purpose, and are payable to the said Mississippi and Mexican Gulf Ship Canal Company or to its order, or to the said Warner Van Norden, in his capacity of assignee or transferee of the said company, as shown by the said bill and exhibits and the form

of warrant filed with complainant's bill and sued on by him; that no suit on any such warrants, whether by said Van Norden as assignee or transferee of said company, or by other holders of any such warrants by transfer or assignment of said company or otherwise, could be maintained in this court, if no assignment or transfer of such warrants and of the rights and choses in action of said company, had been made by the same, the assignor or transferror of said Van Norden, and such other holders of such warrants; the said company being at all times a citizen of the State of Louisiana, and the city of New Orleans, the drawer of said warrants, sought to be charged, being likewise a citizen of the State of Louisiana, jurisdiction of this suit by an assignee and transferee, and for other alleged assignees and transferees claiming to have acquired the rights of said company under assignments to them, being excluded by the acts of Congress.

And for further cause of demurrer, if any is necessary, this defendant shows; that none, or all, of the matters and things alleged in complainant's bill of complaint, show any basis for this suit, as has been adjudged finally by this court in the suit of J. W. Peake vs. The City of New Orleans, No. —— of the docket thereof; and as has been affirmed on appeal, by the Supreme Court of the United States, as will appear by the decision of that court, in said cause or suit, in Volume 139 of the United States Reports, page 342, and the following, in which said Peake sought a judgment against defendant on the same grounds, matters and things alleged in the instant bill; and the said decisions were that the same furnished no cause or ground of complaint, or suit against this defendant.

And for further cause of demurrer, this defendant says, that complainant's bill of complaint is framed on the theory that the city of New Orleans undertook to complete the system of drainage directed by the said legislative act; that if the same had been completed complainant, the aforesaid holder of drainage warrants would have been paid; that the bill charges that the work was abandoned, and therefore it is averred that the city of New Orleans became liable to said warrant holders; but this defendant avers that even if the allegations and averments in the said bill in this respect had any foundation, which

is not in any manner admitted, but denied, then there is and was no liability of the city of New Orleans, as appears by the bill and exhibits to the said warrant holders, and as has been adjudged by this court, and by the Supreme Court of the United States in said suit entitled J. W. Peake vs. City of New Orleans, which said suit is also referred to in complainant's bill of complaint.

And for further cause of demurrer, this defendant says; that there is no matter or thing contained or set forth in complainant's bill of complaint, good and sufficient in law, to call this defendant to any account, and no matter of equity on which this court can ground any decree, or give any relief.

Wherefore, and for divers other errors and defects in the said complainant's bill of complaint contained, and appearing on the face thereof, this defendant does as aforesaid demur in law thereunto, and humbly craves the judgment of this Honorable Court, whether it is compellable, or ought to make any answer thereunto, otherwise than as aforesaid; and this defendant humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.
E. A. O'SULLIVAN,
City Attorney, Solicitor for Defendant.

I hereby certify that in my opinion the above demurrer is well founded in law.

(Signed) BRANCH K. MILLER,
Solicitor for Defendant.
E. A. O'SULLIVAN,
City Attorney, Solicitor for Defendant.

Affidavit.

Personally appeared John Fitzpatrick, mayor of the city of New Orleans, who being duly sworn, deposes and says, that he is the mayor of the city of New Orleans, and that the above demurrer is not interposed for delay.

(Signed) JOHN FITZPATRICK,
Mayor City of New Orleans.

Sworn to and subscribed before me this 4th day of February, 1895.

(Seal) (Signed) FRANK H. MORTIMER,
U. S. Commissioner.

Demurrer Set Down for Argument.

Extract from the Chancery Order Book.

Wednesday, Feby. 6, 1895.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } 12,350.

Now comes complainant through Richard DeGray of counsel and sets down for argument the demurrer herein filed Feby. 4, 1895.

Order—Fixing Demurrer.

Extract from the Minute Book, November Term, 1894.

NEW ORLEANS, Thursday, February 7, 1895.

Court met, pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350.

On motion of Richard DeGray of counsel for the complainant, it is ordered that the demurrer herein filed by the defendant be fixed for trial on Saturday, February 9, 1895, at 11 A. M.

Hearing and Submission of Demurrer.

Extract from the Minute Book, November Term, 1894.

NEW ORLEANS, Saturday, Febuary 9, 1895.

Court met, pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350.

This cause came on to be heard upon the demurrer herein filed by defendant.

Richard DeGray and Rouse & Grant appearing for complainant,

Branch K. Miller for the defendant in support of the demurrer and was argued and submitted—when the court took time to consider.

Decree.

Entered and filed February 26, 1895.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350.

This cause came on to be heard at this term upon the demurrer herein filed by defendant, the city of New Orleans, to the bill of complaint and was argued by counsel and submitted:

On consideration thereof it is ordered, adjudged and decreed that the said demurrer of defendant be sustained and the bill of complaint dismissed at the costs of the complainant.

(Signed) CHARLES PARLANGE, Judge.

New Orleans, Febuary 26, 1895.

Motion and Order for Appeal.

Entered and filed March 4, 1895.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350.

On motion of Richard DeGray, and John G. Rouse and William Grant, solicitors for complainant, and on suggesting to the court that there is error in the final de-

cree of this court rendered and signed of the 25th day of February, 1895, to the prejudice of said complainant and that he desires to appeal therefrom, the assigment of errors this day filed being duly considered,

It is ordered in open court, that complainant be allowed an appeal from said decree with supersedeas returnable to the United States Circuit Court of Appeals for the Fifth Circuit, within thirty days from the date of the entry hereof upon furnishing bond conditioned according to law in the sum of two hundred and fifty dollars with good and solvent security.

(Signed) CHARLES PARLANGE, Judge.

March 4, 1895.

Assignment of Error.

Filed March 4, 1895.

United States Circuit Court, Eastern District of Louisiana.

JOHN G. WARNER
vs.
CITY OF NEW ORLEANS. } No. 12,350.

Assignment of Errors.

And now comes complainant and assigns the following errors in the decree of this Hon. Court dated February 25th, 1895, dismissing complainant's bill of complaint with costs:

1st: The Circuit Court erred in maintaining the defendant's demurrer and in dismissing complainant's bill.

2nd: The Circuit Court should have decided that the city of New Orleans voluntarily entered into the contract of sale passed before Gustave Legardeur, Jr., notary public on the 7th day of June, 1876, and thereby became liable to pay the drainage warrants given for the purchase price of the property therein and thereby acquired without qualification, at least to the extent of the drainage taxes assessed upon streets and squares for which she was then a debtor in the sum of $696,394.30, and the court erred in deciding otherwise, and dismissing the bill.

3rd: The act of the Legislature of the State of Louisiana approved February 24th, 1876, was a special desig-

nation and appropriation of the drainage taxes as they then stood on the records of the mortgage offices of the parishes of Orleans and Jefferson to the payment of the drainage warrants authorized to be issued in payment of the price of said purchase; and the said contract of sale of June 7th, 1876, made pursuant thereto, covenanted and warranted the existence of said drainage taxes without impairment as they stood on said date on said records, and the court erred in deciding to the contrary.

4th. The defendant claims as a defense to this action, that at the time she entered into said contract and acquired property of the value of $300,000, in exchange for drainage warrants payable out of the drainage fund, she had already discharged her own indebtedness to that fund, as well as all liability for any neglect or failure to collect the taxes due on private property, by the previous issue and delivery of bonds of the Drainage Series, issued under Act No. 73 of the year 1872, to an amount in excess of the whole drainage assessments applicable to the payment of said purchase warrants. It was error to maintain this defense.

5th: The defendant having confessed by its demurrer that it had not at any time prior to entering into said contract of purchase claimed she had been discharged from said indebtedness and liability to the drainage fund by the issuance and delivery of said bonds, and that Warner Van Norden the vendor had no knowledge that any such claim existed or would be made as a defense to the payment of the purchase warrants and would not have made the sale if he had been aware that such pretense would be put forward, the court erred in dismissing the bill.

6th: The court erred in not maintaining the estoppel pleaded in this behalf to the bill.

7th: The voluntary contract made by defendant to pay the warrants out of drainage funds which could only be realized by completing the drainage plans or system, or collecting the taxes already assessed, carried with it an implied covenant that if the city failed or neglected to do this, that she would pay the same from other sources. The court erred in holding otherwise.

8th: It was a fraud on the vendor in said contract of sale for the city of New Orleans to agree to pay the price

out of a fund which she knew was wholly inadequate, if her own indebtedness to that fund had already been discharged, and that fact was not disclosed and made fully known to the vendor; and the Circuit Court erred in holding to the contrary.

9th: At the time of the sale on the 7th day of June, 1876, the total amount of drainage taxes then outstanding and uncollected, was $1,469,714.47, of which $696,394.30 was due by the city of New Orleans, and $773,320.17 by individuals, and at said time the total amount of bonds of the "Drainage Series" previously issued and delivered under Act No. 73 of the year 1872, was $1,672,105.21, or $202,390.74 more than the total amount of drainage taxes at said time outstanding, and in view of these facts it was error for the court, after the delivery to and acceptance by the defendant of the property purchased, which it has never returned or offered to return, to allow said defendant to set up any claim or off-set to said drainage taxes then outstanding on the drainage records, or any of them, to the prejudice of the warrants given for said purchase, such claim being moreover in direct contravention of the covenant contained in said act of sale, not to devote said drainage taxes to any other purpose than the payment of the warrants then outstanding.

10th. The court erred in not distinguishing the present suit from the suit of Peake vs. New Orleans, reported in the 139 U. S. R. page 342 and following, and especially in that it did not recognize the fact that the present suit is based on a different obligation, to wit: on drainage warrants given for the purchase of the franchise, machinery, tools, dredgeboats, franchise, etc., purchased under and pursuant to special authority of the Legislature of the State of Louisiana granted by an act approved February 24th, 1876; and did not further recognize the fact that the present suit is based on an assignment from said Van Norden to complainant of all his rights, and rights of action against said city of New Orleans, set up in the bill and in said assignment filed therewith and marked, "Assignment 1;" and farther that it did not recognize the fact that the relation of the city of New Orleans under said act of February 24th, 1876, toward the drainage fund was

changed from that of compulsory and involuntary trustee, to that of voluntary and contractural trustee, and that the duties created by and under said act approved February 24th, 1876, were duties and obligations placed directly on the municipality of New Orleans, in stead of, on the Board of Administrators, as was provided by Act No. 30 of the year 1871.

11th. The Circuit Court being of opinion that the bill of complaint could not be maintained because a receiver had been appointed, should have dismissed the bill "without prejudice," and it was error to dismiss the bill without this qualification.

(Signed) RICHARD DEGRAY,
J. D. ROUSE,
WILLIAM GRANT,
Solicitors for Complainant.

Bond for Appeal.

Filed March 5, 1895.

Know all men by these presents that we, John G. Warner, as principal, and John W. Castles, of New Orleans, Louisiana, as surety, are held and firmly bound unto the city of New Orleans in the full and just sum of two hundred and fifty dollars, to be paid to the said city of New Orleans, her certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 4 day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, lately at a session and term of the United States Circuit Court for the Eastern District of Louisiana, in a suit depending in said court between John G. Warner vs. City of New Orleans, No. 12,350 of the docket of said court, a decree was rendered against the said John G. Warner and the said John G. Warner having obtained an order for appeal, and the same having been entered of record to reverse the decree in the aforesaid suit, and a citation directed to the said city of New Orleans, citing and admonishing her to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden

at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said John G. Warner shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN G. WARNER.
By R. E. GRAY, Solicitor (Seal).
JOHN W. CASTLES (Seal).

Sealed and delivered in presence of—
(Signed) H. J. CARTER.

Approved by
(Signed) CHARLES PARLANGE, Judge.

United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

Clerk's Office: I, Edward R. Hunt, clerk of the [illegible] Court of the United States, for the Fifth Circuit [illegible] do hereby certify, that [illegible] and form a full, com- [illegible] of the record and pro- [illegible] evidence adduced on [illegible] w, The City of [illegible] court. [illegible] city

E. R. HUNT, Clerk.

[illegible] Judge, for the East- [illegible] R. [illegible] as [illegible] the [illegible] of [illegible] [illegible] [illegible]

167-467

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~331~~ 282.

JOHN A. WARNER, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

Acts of the Legislature of Louisiana sent up from United States Circuit Court of Appeals for the Fifth Circuit.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

No. 364.

Filed April 23, 1895. J. M. McKee, cl'k.

No. 165.] AN ACT

To provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That for the purposes of this act, all that portion of the parish of Orleans, lying and being within the following limits, viz: beginning at the Mississippi River at Julia street, following said street to the canal of the New Orleans Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to the Bayou Saint John, following said bayou to the Canal Carondelet, along said Canal to St. Peter street, along St. Peter street to the river, following the banks of the river to the starting point, shall constitute the *First Draining District.* That the following portions of the parishes of Orleans and Jefferson, viz: beginning at the Mississippi River, at the upper side of Julia street, along Julia street to Mobile Landing, along said landing to Delord street, along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the Jefferson and Pontchartrain Railroad, following said road to the river Mississippi, and following the banks of said river to the starting point, shall constitute the *Second Leveeing and Draining District.* And all that portion of the parish of Orleans lying and being within the following limits, viz: from the river Mississippi at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Pontchartrain, along the shores of said lake to Lafayette Avenue, following said avenue to the river Mississippi, along the banks of said river to the starting point, shall constitute the Third Leveeing and Draining District.

SEC. 2. *Be it further enacted, &c.,* That for the purpose of carrying into effect the provisions of this act, there shall be three Boards of Commissioners, to be appointed and organized as follows: one to be designated and known as the Board of Commissioners of the First Draining District; one as the Board of Commissioners of the Second Draining District; and one as the Board of Commissioners of the Third Draining District. Each Board of Commissioners shall be composed of five persons, residents of the district for which they are appointed. The Board of Commissioners of the First and Third Draining Districts shall be appointed by the Mayor of the city of New Orleans, by and with the advice and consent of the Board of Aldermen of said city; and the Board of Commissioners of the Second Draining District shall be composed of five persons, residents of the said district, to be appointed as follows, viz: two

by the Mayor of the city of New Orleans, by and with the advice and consent of the Board of Aldermen of the city, one by the council of the city of Jefferson, one by the Police Jury of the parish of Jefferson, and one by the council of the town of Carrollton. Said Commissioners shall serve for the term of four years; and no member of the Common Council of the city of New Orleans, of the Police Jury of the parish of Jefferson, or of the councils of the city of Jefferson and town of Carrollton, shall, during the term for which they shall have been elected, be eligible as Commissioners in either of the Districts aforesaid.

SEC. 3. *Be it further enacted, &c.*, That at the first meeting of the Boards of Commissioners of the First and Third Draining Districts, the said Boards shall be divided by lot into two classes. The seats of the first class shall be vacated at the end of two years, and the seats of the second class shall be vacated at the end of four years; *Provided*, That three members shall constitute the first class, and two members shall constitute the second class, and that every two years thereafter the Mayor, as aforesaid, shall appoint, as hereinafter provided, Commissioners to fill the vacancies in each Board whose terms may have expired; and in case of vacancy by death, resignation, or otherwise, the Mayor shall appoint, in the same manner as hereinafter provided, Commissioners to fill the vacancies of the unexpired term; it being understood that the Board of Commissioners for the Second Draining District shall serve for the full term of four years, and in case of vacancy by death, resignation, or otherwise, in said Board, such vacancy shall be filled by the authority making the original appointment.

SEC. 4. *Be it further enacted, &c.*, That the said Boards of Commissioners are hereby invested with all the rights and powers necessary to thoroughly drain the several Draining Districts, as expressed in the first section of this act, and to that end shall have the right, at all times, of entering on the lands within the limits of the districts aforesaid, and of placing thereon their engines and machinery, and of freely passing over and using the same, and of digging all necessary canals and drains, making all necessary embankments and levees, and of doing all things lawful to be done, which may be useful or necessary in draining, cleaning and reclaiming the land within said districts. Said Boards of Commissioners are authorized to cut their canals and drains through the streets and squares, and in the event of any street selected for the location of a canal being too narrow for a draining canal and a public highway, the said Board of Commissioners may cause such streets to be widened; *Provided, however*, That any person or corporation shall have the right, by petition addressed to any court of competent jurisdiction, to oppose any acts of the Boards, in the exercise of the powers conferred by this section on said Boards, and it shall be the duty of such court summarily to hear and determine the same, after a full hearing of both parties; and such court shall limit the action of the Boards to the exercise of the powers herein conferred, in carrying into effect the provisions of this act, according to its true intent and meaning, and where the same cannot be done without injury

or loss to the complainant, said court shall award adequate compensation; *And provided also*, That on appeal to the Supreme Court, the trial of the same shall have priority and preference over all other cases therein, and on such appeals the said Boards shall only be required to give security for costs of appeal; *And provided further*, That in any such suit nothing herein contained shall prevent said Boards from recovering judgment against any such complainant or complainants for damages, where it can be shown that such have been incurred, and that such suit or suits were brought on frivolous grounds or from improper motive.

SEC. 5. *Be it further enacted, &c.*, That said Boards shall each have the right to sue and be sued, to contract for works necessary to be done, under this act, to have a seal and to alter the same, to accept and receive any gift, legacy, or donation that may be made or left in their favor, and generally to do all that may be convenient or necessary for the performance of the duties which are imposed upon them, or that may be requisite for the welfare or success of the plan of operations which are confined to them by this act, but not beyond the powers herein conferred.

SEC. 6. *Be it further enacted, &c.*, That the domicil of the said Boards of Commissioners shall be located in the city of New Orleans; each Board shall organize within fifteen days after their appointment, or as soon thereafter as practicable, and shall appoint one of their number as President, on whom legal service of all process or citation against such Board shall be made. Each Board of Commissioners is hereby empowered and authorized to appoint such officers, and to make such by-laws, rules, and regulations for their own government, as they may see fit, and from time to time to change the same, under such restrictions as they may think proper to impose.

SEC. 7. *Be it further enacted, &c.*, That said Board of Commissioners shall have the right to proceed, and are hereby empowered to levee, drain, and reclaim the lands embraced within their respective draining sections or districts, as established by this act, in the following manner: Whenever either of said boards of commissioners is prepared to drain their respective sections or district, such boards of commissioners shall cause a plan thereof to be made, accurately designating the limits of the section or district, to be drained as far as possible, the subdivision of the property therein contained, *and the names of the proprietors*, as also the dimensions and directions of the canals intended to be dug, and the place where the steam engines will be established. Such plan or plans shall be deposited in the office of the Recorder of Mortgages of the parish in which the section or district to be drained is situate, and notices shall be inserted, in the French and English, in two newspapers published in the said city of New Orleans, at least once a week during four weeks in succession, announcing that such board of commissioners will proceed to drain such section, describing the place where the plan thereof is deposited, accurately defining the limits thereof, and indicating as nearly as possible, the time within which the draining thereof will be completed, and the probable cost of said works. After such publications, such board of commissioners shall apply, by pe-

tition, to one of the district courts in the parish of Orleans for that portion of the section or district lying within the limits of said parish, and to the District Court in the parish of Jefferson for that portion of the section or district lying within said parish; which court or courts, upon due proof being made of the publications of said notices aforesaid, *shall decree that each portion of the property situated within the said limits is subject to a first mortgage, lien, and privilege in favor of such board of commissioners for such amount as may be assessed upon such property for its proportion* of the costs of draining such section or district, and interest thereon at six per centum per annum from demand thereof. The decree of the District Court in the parish of Orleans shall be recorded in the office of the Recorder of Mortgages in and for said parish, and the decree of the District Court of the parish of Jefferson, shall be recorded in the office of the Parish Recorder of said parish, and a certified copy of the aforesaid plan or plans shall also be deposited in each of said offices for the information of said recorders. Said recorders shall be entitled to twenty dollars each for the recording of the said decree and the deposit of said plan or plans; and, in case they be required by said board of commissioners to record the said decree in the name of any or all of the proprietors of real property within said section or district, they shall be entitled to receive fifty cents for such special recording; and whenever the said recorders, or either of them, may be required to deliver a certificate of mortgages on any real property embraced within said draining section or district, such recorder shall mention therein that such property is subject to a lien, privilege, and first mortgage in favor of the board of commissioners of the section or district in which such property is situate, for such sum of money as may be assessed on such property for the draining thereof; said lien, privilege, and first mortgage shall take precedence over all mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal or judicial, and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full.

SEC. 8. *Be it further enacted, &c.*, That said boards of commissioners, each within its own section or district, shall have the right and are hereby authorized and empowered to levy such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board, to defray the construction of the levees, machinery, canals, and other works necessary for the purpose of carrying out the provisions of this act as applicable to its particular district, which shall be collected, from time to time, as the wants of such board or boards of commissioners may require; *Provided, however*, That the same shall not, in the aggregate for any one district, exceed the sum of three hundred and fifty thousand dollars; *And provided further*, That not more than one-half of said amount shall be demandable within two years after the passage of this act.

SEC. 9. *Be it further enacted, etc.*, That on non-payment of the amount of the assessment, judgment therefor shall be recoverable before any court of competent jurisdiction, and the land so assessed

shall be sold according to law, and each board are hereby authorized to purchase the same, and shall hold or dispose of the same for the benefit of such drainage district; *Provided*, That the sale thereof shall be made at public auction after thirty days' notice by three advertisements in some newspaper published in such district; *And provided further*, That the price of such sale shall fully cover the amount of the judgment with all costs and interests up to the time of purchase by such draining board with six per cent. per annum interest upon the aggregate so formed from that time until its alienation by the board, and if, while the property of the draining district, such property would have become liable for any further assessment, the sale shall also cover the amount thereof.

SEC. 10. *Be it further enacted, etc.*, That no compensation shall be allowed to said commissioners for their services, but they shall have the right to appoint and employ such officers and employees as they may deem proper, and fix their salaries or compensations; and said commissioners shall make annual reports of all their operations under this act to the Common Council of the city of New Orleans, and as often as required so to do by said Council.

SEC. 11. *Be it further enacted, etc.*, That the sum of eighty-one thousand dollars be and the same is hereby appropriated out of the Swamp Land Fund of the First Swamp Land District of this State, to aid in carrying out the object of this act. The sum so appropriated shall be equally divided among the said draining sections or districts, as fixed by this act, and in proportion to the area of each district to be drained.

SEC. 12. *Be it further enacted etc.*, That the Legislature reserve the right of repealing, altering, changing, or modifying this act.

SEC. 13. *Be it further enacted, etc.*, That this act shall take effect and be in full force from and after its passage, and that all laws or parts of laws contrary to, or in anywise conflicting with the provisions of this act, be and the same are hereby repealed.

WM. W. PUGH,
Speaker of the House of Representatives.
C. H. MOUTON,
Lieutenant Governor and President of the Senate.

Approved March 18th, 1858.

ROBERT C. WICKLIFFE,
Governor of the State of Louisiana.

A true copy.

ANDREW S. HERRON,
Secretary of State.

No. 191.] AN ACT

Supplementary to an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That in order to enable the several Boards of Commissioners created under and by virtue of the act entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight, to carry into effect and to commence immediately the works therein contemplated, each of said Boards of Commissioners be, and are hereby authorized and empowered to issue bonds of the sum of five hundred dollars each, having not more than thirty years to run, and bearing interest not exceeding eight per cent. per annum; the said bonds shall be designated as "Draining Bonds" and shall be signed by the President and countersigned by the Secretary of the Board of Commissioners issuing them; *Provided*, That the total amount of bonds so issued shall not, for any one draining section or district, exceed the sum of three hundred and fifty thousand dollars.

SEC. 2. *Be it further enacted, &c.*, That it shall be the duty of the Boards of Commissioners aforesaid, upon issuing draining bonds as authorized by the first section of this act, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of such Board or Boards, in conformity with the provisions of the afore recited act, entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March eighteenth, eighteen hundred and fifty-eight, and fix and apportion the amount to be paid yearly, by the owner or owners of said lands, in order to pay the annual interest on said bonds, and such bonds as may mature: *Provided*, That the amount of assessment demandable and collectible yearly, shall not exceed in the aggregate more than one-tenth of such assessment.

SEC. 3. *Be it further enacted, &c.*, That it shall be the duty of each of said Boards of Commissioners daily, upon the receipt of any sum or sums of money in payment of any assessment levied as aforesaid, to deposit the same with the "fiscal agent of the city of New Orleans," to the credit of the draining fund of its section or district; and the amount or amounts so deposited with said fiscal agent, as a special fund for the payment of the annual interest on said draining bonds, and the redemption of said bonds at maturity, and shall only be drawn therefrom to pay said annual interest or redeem said bonds, or for the purpose of purchasing bonds as hereinafter provided: *Provided*, That no portion of said fund shall be drawn, except by virtue of a resolution of the Board of Commissioners depositing the same and for the purpose aforesaid.

SEC. 4. *Be it further enacted, &c.*, That whenever, after the pay-

ment of the annual interest on said bonds, and of such bonds as have matured, the amount remaining with said fiscal agent, to the credit of the Draining Fund aforesaid, of either of said draining sections or districts, shall exceed the sum of ten thousand dollars, it shall be the duty of the Board of Commissioners, of such section or district, to advertise during thirty days in the official journal of the city of New Orleans, for sealed proposals for the sale to said Board of such of the draining bonds thereof, having the shortest period to run, and amounting to the sum so remaining on deposit as aforesaid; and at the expiration of said publication, said Board of Commissioners shall open said sealed proposals and accept the lowest bid or bids: *Provided*, That no bid shall be accepted, which demands more than the face of the bond.

SEC. 5. *Be it further enacted, &c.*, That after the completion of the works for the leveeing, draining and reclaiming of either of the draining sections or districts aforesaid, the Boards of Commissioners thereof shall annually make an estimate of the amount required to keep up and maintain the said works and continue the draining thereof, and shall furnish the said estimate to the Common Council of the city of New Orleans for that portion lying within the limits of said city, and to the Police Jury of the Parish of Jefferson, for that portion lying within the limits of the parish of Jefferson; and it shall be the duty of the said Common Council and the said Police Jury respectively, to levy a uniform tax or assessment upon the superficial or square foot of the lands situate within said draining sections or districts respectively, sufficient to meet the amounts respectively required, and the tax or assessment so levied, shall be collected in the same manner as the city and parish taxes, and paid unto the respective Boards of Commissioners, who shall disburse and account for the same.

SEC. 6. *Be it further enacted, &c.*, That it shall be the duty of each of said Boards of Commissioners, in the month of January of each year, to make a full and complete report to the Common Council of the city of New Orleans and the Police Jury of the parish of Jefferson respectively, showing what works have been made, or may be in progress, the condition and costs thereof; what bonds have been issued and the amounts derived therefrom, the disposition thereof, what amounts from assessments have been paid, the condition of the Trust Fund, and generally all such other information as may be required or be of interest.

SEC. 7. *Be it further enacted, &c.*, That the bonds which may be issued by either of the Boards of Commissioners by virtue of this act, shall be exempt from any and all taxation in whose hands the same may be found.

SEC. 8. *Be it further enacted, &c.*, That the said Boards of Commissioners shall have at all times access to, and the right of copying, or causing to be copied, any plans or parts of plans, of the city of New Orleans and the parish of Jefferson, in the possession or keeping of the Common Council of said city of New Orleans or of the parochial authorities, or of any surveyor or any other officer thereof, to be certified by such custodian to be a correct copy or copies thereof,

and the same to include the street or streets, roads or highways of any portion or section thereof, to be drained according to the provisions of this act, and of the act to which this act is supplementary.

SEC. 9. *Be it further enacted, &c.*, That this act shall take effect and be in full force from and after its passage.

WM. W. PUGH,
Speaker of the House of Representatives.
WM. F. GRIFFIN,
President of the Senate.

Approved March 17th, 1859.

ROBERT C. WICKLIFFE,
Governor of the State of Louisiana.

A true copy.
ANDREW S. HERRON,
Secretary of State.

No. 57.] AN ACT

To provide for the Collection of the Assessment for Draining, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the act supplementary thereto of March seventeenth, eighteen hundred and fifty-nine.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the amount of assessment which the Board of Commissioners of the several Draining Districts are authorized to fix and apportion, to be paid yearly by the owner or owners of the lands within said Districts, in order to pay the annual interest on the Bonds issued or to be issued by said Boards of Commissioners, and such bonds as may mature by virtue of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming Swamp Lands in certain portions of the parishes of Orleans and Jefferson, approved March eighteenth, eighteen hundred fifty-eight, shall be collected and sued for, the following mode of proceedings, to wit: As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the Third District Court of New Orleans, for the assessment made on property within the limits of the parish of Orleans, and in the Third Judicial District Court sitting at Carrollton for assessments made on property within the limits of the parish of Jefferson, on which tableau of assessment thus to be filed the property assessed shall be set forth, together with the amounts assessed, *and the names of the owners thereof,* if known, and if the owners' names are not known, then it shall be *stated in said assessment roll that the property assessed belongs to owners unknown;* that a petition shall be filed with said assessment roll praying for an order that *all persons whom it may concern,* do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order thus rendered shall be published in the English and French languages, at least twice each week for thirty days in one newspaper published in the city of New Orleans, as to the order of the Third District

Court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the Third Judicial District Court sitting at Carrollton; and after said publications the said Courts shall, on motion of the Counsel of said Board of Commissioners, *approve and homologate said assessment rolls, which shall be a judgment against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary mode of proceedings*, and the Court shall at the same time and in the same judgment, order the delinquent parties to pay ten per cent. in addition to the amount assessed, to pay costs and counsel fees.

SEC. 2. *Be it further enacted, &c.*, That this act shall take effect from and after its passage.

C. H. MORRISON,
Speaker of the House of Representatives.
HENRY M. HYAMS,
Lieutenant Governor and President of the Senate.

Approved March 1st, 1861.

THOS. O. MOORE,
Governor of the State of Louisiana.

A true copy.
PLINY D. HARDY,
Secretary of State.

No. 30.] AN ACT

To provide for the drainage of New Orleans.

WHEREAS, The proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the Mississippi and Mexican Gulf Ship Canal Company, a corporation now existing and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

SEC. 2. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of the said canal and levee, and of all canals dug

and levees built by the said company, to be designated and fixed by the Board of City Administrators, and the title to the lands necessary for said works to be procured and held, for the benefit of the city of New Orleans, by the Board of Administrators of the city of New Orleans; the said lake shore canal to be not less than sixty-five feet wide on the surface, and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the lake shore to serve as a reservoir for draining the city of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide, and of sufficient height to completely protect the city from overflow from Lake Pontchartrain.

SEC. 3. *Be it further enacted, etc.*, That said company shall also be authorized and empowered to excavate canals of the dimensions, and at such localities as may be fixed by the Board of Administrators of the city of New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river, and connect with the drainage canals now located in the said area.

SEC. 4. *Be it further enacted, etc.*, That the said company shall also be empowered and authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee, along the lake, with the Mississippi, of a sufficient size to fully protect the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by the said Board of Administrators; the object of these two canals and protection levees to be the protection from overflow of the areas between the Mississippi river and Lake Pontchartrain, above the New or company canal, and below the Carondelet canal.

SEC. 5. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in the rear of the said city, of the dimensions of ten feet or more than ten feet in width.

SEC. 6. *Be it further enacted, etc.*, That the Board of Administrators shall be required, and it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protection levees above specified, the city of

New Orleans is hereby made liable to the said company for the damages resulting from such delay.

SEC. 7. *Be it further enacted, etc.*, That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

SEC. 8. *Be it further enacted, etc.*, That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed, by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during said month, and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor or engineer appointed by the Board of Administrators, by the President of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the President of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

SEC. 9. *Be it further enacted, etc.*, That in order to provide funds for the payment of the work to be done by the said company, the three boards of draining commissioners for the draining districts of Orleans and Jefferson, established under the acts of March 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the Board of Administrators of New Orleans *all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaus, judgments in favor of commissioners, the office furniture of said drainage commissioners*, a true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said draining districts; that the Board of Administrators of New

Orleans, be and are hereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, *which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; provided, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under, and created by, the acts of March* 18, 1858, *and of March* 17, 1859, *and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners; provided,* that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, *be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; and provided further,* that the rights, powers and faculties possessed and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights powers and faculties acquired by the said company, in excavating canals and building levees, as stipulated in the various sections of this act.

SEC. 10. *Be it further enacted, etc.,* That all acts and parts of acts in conflict with, or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans, Jefferson," etc., passed *March* 2, 1869, generally known as the Ship Island canal bill; also, an act amendatory thereto, approved *March* 16, 1870.

SEC. 11. *Be it further enacted, etc.,* That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the

New, or Canal and Banking Company's canal, extending to Lake Pontchartrain and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides or high water in Lake Pontchartrain, the dimensions of said levees to be determined by the Board of Administrators.

SEC. 12. *Be it further enacted, etc.*, That this act shall be favorably construed, so as to favor all the purposes and objects of the same, and the operations of the provisions thereof, and shall take effect from and after its passage.

(Signed) GEO. W. CARTER,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

A true copy:
GEO. E. BOVEE,
Secretary of State.

The foregoing act, received in my office, February 24, 1871, having been presented to the Governor of the State of Louisiana for his approval, and not having been returned by him to the House of the General Assembly in which it originated, within the time prescribed by the Constitution of the State of Louisiana, has become a law without his approval.

GEO. E. BOVEE,
Secretary of State.

No. 73.] AN ACT

To authorize the Council of the city of New Orleans to levy a police tax; to regulate levies of taxes, the proceedings of tax suits, and the jurisdiction of the district courts for the parish of Orleans in reference thereto; to define and punish forgery in certain cases; to authorize the funding of the floating debt; to consolidate, limit and provide for the debt of the city of New Orleans, principal and interest; to authorize a tax for the support of the city government, and to establish a fiscal agency, defining its duties, and for the better enforcement of the collection of all taxes.

SEC. 13. *Be it further enacted, etc.*, That for unbonded *debts* existing December 31, 1871, and unpaid at the time of the passage of this act, or *caused* by receipts of certificates of 1871, for revenues proper of 1872, and for excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time to time, as they may be required, bonds of the denominations of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent. interest, principal and interest payable in gold in New York or New Orleans, and at any other points that the Council may designate, with quarterly coupons, and that the bonds thus issued shall be called the new consolidated debt of New Orleans. No bonds shall be issued but by authority of the Council, nor for a lower rate than ninety cents on the dollar; all issued for the excavations and levees, authorized by Act No. 30 of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series," and all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase

from the lowest bidder of bonds issued for drainage; no bid to be accepted above par, and the right reserved to the Council to reject all unsatisfactory bids.

And for other bonds of the city not matured, bearing interest at not less than seven per cent., the city may exchange bonds of the new consolidated debt, at such prices, not less than par, for the new consolidated debt bonds as may be found to the advantage of the city; but no exchange shall be effected except by consent and order of the Council, publicly given, or ordinance fully authorizing the same.

For all bonds fully matured and payable so soon as the term they were issued for shall have expired, and which the city shall not have the available funds to pay in cash, the city may exchange new consolidated bonds, at the rate of not less than ninety cents on the dollar on demand of the holders of the bonds so matured.

And it is furthermore enacted that at no time shall the face of the bonded debt outstanding and unredeemed added to the certified debt of every form exceed twenty-three millions of dollars, and all issue of bonds or evidence of indebtedness whatever in excess of said amount shall be unlawful, and shall not import or convey any obligation. And if any person under color of office, or otherwise, shall issue any bond or warrant in violation of this section, he shall be prosecuted criminally by indictment or information, and upon conviction, shall be condemned to imprisonment for two years; and any person negotiating or attempting to negotiate such bond or warrant shall be considered an accessory to the fact, and subject to the same punishment as the said offender.

SEC. 14. *Be it further enacted, etc.*, That within the months of November and December, 1872, and annually thereafter, the Council shall adopt estimates of receipts and expenditures (the latter including police and excluding schools) for the ensuing year. The estimate of expenditures shall not be finally adopted until one week shall have elapsed after final adoption of the estimate of revenues, and it shall not exceed the same.

SEC. 15. *Be it further enacted, etc.*, That the Council, after the adoption of the estimate, shall proceed to levy the annual taxes required, to wit:

First—The city debt tax, which shall be based upon the detailed estimate of the sinking funds and interest falling due. For all bonds for which no other retiring provision exists by law, an estimate shall be included of not less than two nor more than ten per cent. of the face of the bonds outstanding of any of the several issues, which shall be applied to the retiring of bonds offered at the most advantageous rates, no bid to be accepted higher than par, and the right reserved to reject all bids. No limit other than herein laid down shall apply to this tax, which is hereby declared a vested right of the bondholders interested.

Second—A tax for current city expenses, including police and exclusive of interest and schools. This tax shall in no year exceed one and a quarter per cent. upon the assessed value of real, personal and mixed property.

These taxes shall bear the name of the year in which they shall be collectible, and the assessment upon which they shall be made shall be termed the assessments for the said year.

SEC. 16. *Be it further enacted, etc.*, That no provision in any general law of the State limiting the power of taxation by the several cities, towns, parishes and other corporations, shall be held to apply to any of the taxes of the city of New Orleans, herein or otherwise specially authorized to be levied.

(Signed) O. H. BREWSTER,
Speaker of the House of Representatives.

(Signed) P. B. S. PINCHBACK,
Lieutenant Governor and President of the Senate.

Approved April 26, 1872.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
F. J. HERRON,
Secretary of State.

No. 16.] AN ACT

To authorize the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferee; and to provide for the manner of making said purchase and for paying therefor in drainage warrants.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Common Council of the city of New Orleans is hereby authorized and empowered to transact and contract with the Mississippi and Mexican Gulf Ship Canal Company, and the transferee thereof, for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of act No. 30 of acts of 1871; also for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30.

SEC. 2. *Be it further enacted, etc.*, That should it be deemed advisable by said Council to make said purchase and settlement, it shall be the duty of said Council of the city of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance.

SEC. 3. *Be it further enacted, etc.*, That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of the said company under act No. 30 of acts of 1871 for work done. They shall

be made payable out of the drainage assessments, and shall be issued as soon as any agreement shall have been completed.

SEC. 4. *Be it further enacted, etc.*, That whenever the sale and purchase contemplated by this act shall be completed and the drainage warrants issued in payment of the price agreed on and fixed, the city of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by act No. 30 of acts of 1871 relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferee; the city of New Orleans shall alone have the power, either through its own officers and employees or by contract to the lowest bidder, to do all canalling, dredging, ditching, or drainage work required to be paid for by assessment upon property or from the city treasury.

SEC. 5. *Be it further enacted, etc.*, That hereafter the City Council shall fix the dimensions of all canal excavations and protection levees required for the city of New Orleans.

SEC. 6. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with the provisions of this act or inconsistent therewith be and are hereby repealed, and that this act take effect from and after its passage.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved February 24, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE,
Secretary of State.

No. 48.] AN ACT

To exclude certain lands from the drainage limits as heretofore established; to cancel liens and judgments for drainage of said lands, and to repeal certain laws relative to drainage of the parishes of Orleans and Jefferson.

WHEREAS, The several laws, heretofore enacted for the drainage of certain portions of the parishes of Orleans and Jefferson, have failed in their purposes and a certain portion of the lands therein situated have not and will not be drained; therefore

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That all laws or parts of laws providing for the drainage of lands in the parishes of Orleans and Jefferson, be and they are hereby repealed, so far as they provide for the drainage of lands north of the following line, commencing at the intersection of the Metairie Ridge, with the upper protection levee, along said ridge to the New Orleans Canal, to the Metairie Road, thence along the Metairie Road to Bayou St. John, thence along Bayou St. John to Marigny avenue, thence along

Marigny avenue to Bayou Sauvage, thence along Bayou Sauvage to People's avenue, thence along People's avenue to Lafayette avenue, thence along Lafayette avenue to the river Mississippi.

SEC. 2. *Be it further enacted, etc.*, That all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all legal proceedings pending therefor, be and they are hereby cancelled and annulled; *provided*, that the benefits of this act shall not be invoked in favor of any land until the State and city taxes due thereon are paid; *provided further*, that all lands situated within the above described lines and excluded by this act from the drainage limits established under previous laws, and upon which drainage taxes or assessments have already been paid shall hereafter be exempt from all future drainage assessments.

SEC. 3. *Be it further enacted, etc.*, That all acts or parts of acts in conflict with or inconsistent with the provisions of this act be and the same are hereby repealed.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

OFFICE OF THE SECRETARY OF STATE,
STATE OF LOUISIANA.

Received in the office of the Secretary of State, at New Orleans, this twelfth day of March, eighteen hundred and seventy-seven, the foregoing bill, having been presented to his Excellency the Governor of the State for his approval and signature, and not having been returned by him to the House of Representatives, in which body it originated, with his signature or his objections thereto, within the time prescribed by the Constitution of the State of Louisiana, the same has become a law without his approval or signature.

(Signed) OSCAR ARROYO,
Assistant Secretary of State.

A true copy.
OSCAR ARROYO,
Assistant Secretary of State.

No. 67.] AN ACT

To define the object of drainage assessments and to regulate the collection of same, and to prevent judgments for assessments being rendered as personal judgments, and to repeal so much of Act No. 57, approved March 1, 1861, as makes such judgments personal, and to confine the execution under assessment judgments to the property on which the assessment is Levied.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the true intent and meaning of all drainage laws in this State wherein liens and privileges are recorded against property requiring drainage are that under said liens and privileges no assessments for drainage or judgments for the same shall be collected from the property drained, or its owner or owners, until after there has been conferred upon the property such improvements by canals and adequate machinery as will effect the drainage equal in value to the assessment exacted from said property.

SEC. 2. *Be it further enacted, etc.*, That any assessment or judgment embracing the same shall operate only upon the property upon which such assessment is levied.

SEC. 3. *Be it further enacted, etc.*, That all parts of Act No. 57, session acts of 1861, which make judgments on drainage assessments personal judgments be and the same are hereby repealed.

SEC. 4. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

OFFICE OF THE SECRETARY OF STATE,
STATE OF LOUISIANA.

Received in the office of the Secretary of State at New Orleans, this fourteenth day of April, A. D. 1877. The foregoing bill having been submitted to his Excellency, the Governor of this State, for his approval and signature, and not having been returned by him to the Senate of the State of Louisiana, in which body it originated, with his approval and signature, or with his objection thereto, within the time prescribed by the Constitution of the State of Louisiana, the same has become a law by limitation of time.

(Signed) WILL. A. STRONG,
Secretary of State.

A true copy:
WILL. A. STRONG,
Secretary of State.

No. 20.] AN ACT

To incorporate the city of New Orleans, provide for the government and administration of the affairs thereof; and to repeal all acts inconsistent and in conflict with its provisions, due public notice having been given according to requirements of Article 48 of the Constitution.

SEC. 42. All laws providing for the drainage of the City of New Orleans, or portions thereof, and a collection of the drainage tax assessment are hereby repealed.

R. N. OGDEN,
Speaker of the House of Representatives.
GEO. L. WALTON,
President pro tem. of the Senate.

Approved June 23, 1882.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy:
WILL. A. STRONG,
Secretary of State.

No. 7.] AN ACT

To extend the limits of the Parish of Orleans, and to change the boundaries of the Parishes of Orleans and Jefferson, and to consolidate the cities of New Orleans and Jefferson, and to provide for the government of the city of New Orleans and the administration of the affairs thereof, and to repeal an act entitled "An Act to incorporate the city of New Orleans," approved February 23, 1852; and to repeal all acts amendatory thereto, and to repeal an act entitled "An Act to incorporate the City of Jefferson," approved March 9, 1850, and to repeal all acts amendatory thereto, and to provide for the funding of the floating indebtedness of the corporations as consolidated by this act.

SEC. 34. *Be it further enacted, etc.*, That all the right, title and interest of the city of New Orleans, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property, of whatsoever description, and wherever situated, and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans, as incorporated by this act, and that all the right, title and interest of the City of Jefferson as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans as incorporated by this act; and that all the right, title and interest of the police jury of the parish of Orleans, right bank, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgment and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans as incorporated by this act, to take effect on the first organization of the Common Council as herein provided; *Provided*, that all the estates, income, funds or property of any description now held in trust by said city of New Orleans, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans under this act, upon and for the same uses, trusts, limits, limitations, charities and conditions as the same are now held; and the debt generally known as the consolidated city debt, and the bonds issued in favor of the New Orleans, Opelousas and Great Western Railroad Company, the New Orleans, Jackson and Great Northern Railroad Company, and the Pontchartrain Railroad, and all other indebtedness or liabilities of the city of New Orleans, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be assumed and paid by the city of New Orleans, as constituted and incorporated by this

act, and said city is declared liable therefor; *Provided, further*, That all the estates, income, funds or property of any description now held in trust by said City of Jefferson, or the police jury of the parish of Orleans, right bank, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans under this act, upon and for the same uses, trusts, limitations, charities and conditions as the same are now held; and the debt and all other indebtedness or liabilities of the City of Jefferson, and the police jury of the parish of Orleans, right bank, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be assumed and paid by the city of New Orleans, as constituted and incorporated by this act, and said city is declared liable therefor; and upon the organization of the Council of the city of New Orleans, as provided for in this act, all the powers, rights, privileges and immunities possessed and enjoyed by the Mayor and Common Council of the city of New Orleans, as at present constituted, shall cease and terminate, and be vested in the city of New Orleans, as established by this act; and all the rights, powers, privileges and immunities possessed and enjoyed by the Mayor and Common Council of the City of Jefferson, and the police jury of the parish of Orleans, right bank, as at present constituted, shall cease and terminate, and be vested in the city of New Orleans, as established by this act; *Provided*, That all officers of said city of New Orleans and Jefferson, and the police jury of the parish of Orleans, right bank, as at present constituted, shall continue to discharge their respective offices until superseded by the action of the council created by this act; and that all the ordinances of the city of New Orleans and Jefferson, and of the police jury of the parish of Orleans, right bank, now in force shall remain in force until modified or repealed by the Council created by this act; *Provided, further*, That the vested rights of individuals or companies of the cities of New Orleans and Jefferson, or the police jury of the right bank, that have been acquired from the said corporation, shall not be interfered with, or impaired by the council of the city of New Orleans, as constituted by this act.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved March 16, 1870.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:

GEO. E. BOVEE,
Secretary of State.

No. 71.] AN ACT

To annex the city of Carrollton to the city of New Orleans; to provide for the transfer of certain transcript from the office of the recorder; the transfer of books, papers, documents and property of the city of Carrollton, and also the public schools to the city of New Orleans; to provide for the debt of Carrollton; creating the seventh district of the city of New Orleans, and a municipal court; a sanitary district, and repealing the act incorporating the city of Carrollton.

SEC. 5. *Be it further enacted, etc.*, That all the rights, titles and interest of the city of Carrollton, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans; *provided*, that all estates, income, funds or property of every description now held in trust by said city of Carrollton, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans under this act upon and for the same uses, trusts, limits, limitations, charities, and conditions as the same are now held; and the debt and all other indebtedness or liabilities of the city of Carrollton, including the funding and improvement bonds and the bonds issued to the Jefferson City Gaslight Company, and known as the gas bonds, and notes, interest coupons, wages, salary due or to become due, warrants or other species of obligations whatsoever, shall be assumed and paid by the city of New Orleans, and said city is hereby declared liable therefor; *provided, further*, that all officers of said city of Carrollton shall continue as at present constituted to discharge the duties of their respective offices until this act of incorporation can be completed by putting into possession of the proper officers of the city of New Orleans the books, papers, records, documents and other property now belonging to the city of Carrollton, and no longer; and after which time all the powers, rights, privileges, and immunities possessed and enjoyed by the mayor and council of the city of Carrollton shall cease and terminate; *and provided, further*, that the claims or vested rights of any person or persons or company or corporation of said city of Carrollton that have been granted, acquired or received from or against said corporation of the city of Carrollton or otherwise, shall not be interfered with, divested or impaired by this act, nor by the city of New Orleans, without adequate compensation.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved March 23, 1874.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

P. G. DESLONDE, *Secretary of State.*

No. 22.] JOINT RESOLUTION

Submitting an amendment to the constitution of the State to limit the debt of the city of New Orleans, and the issue of warrants by the officers; and prescribing certain penalties.

SECTION 1. *Be it resolved by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, (two-thirds of the members elected to each House agreeing thereto), That at the general election for members of the General Assembly, which will take place in November, 1874, an amendment to the constitution of the State shall be submitted to the qualified electors of the State for their ratification or rejection in the words following:

Article —. The city of New Orleans shall not hereafter increase her debt, in any manner or form, or under any pretext. After the first day of January, 1875, no evidence of indebtedness or warrant for payment of money shall be issued by any officer of said city, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased, nor to prevent the issue of drainage warrants to the transferee of contract, under act No. 30 of 1871, payable only from drainage taxes, and not otherwise; any person violating the prohibitions, [provisions] of this article shall, on conviction be punished by imprisonment for not less than two nor more than ten years, and by fine of not less than three dollars nor more than ten thousand dollars.

SEC. 2. *Be it further resolved, etc.*, That at said next general election, the wishes of the electors, in the premises, shall be expressed by printed or written ballots, as follows:

"For the amendment limiting the debt of New Orleans;" or, "Against the amendment limiting the debt of New Orleans," and said ballots shall be counted and returns made, and the result declared as in the case of election of State officers.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved February 24, 1874.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

P. G. DESLONDE,
Secretary of State.

No. 5.] AN ACT

To limit and restrict the power of courts to issue orders or writs of mandamus and *fieri facias* against the city of New Orleans and the officers thereof, and to declare the effect and prescribe the mode of satisfying judgments for money against the city of New Orleans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That from and after the passage of this act, no court within the State shall have authority or jurisdiction to allow, order, hear, entertain or enforce any summary process or proceeding, or writ, or order of mandamus, or any order or proceeding in the nature of an order or writ of mandamus, *or any order or proceeding in the nature of an order or writ of mandamus*, either against the Controller, Deputy Controller, or any auditing officer of the city of New Orleans, either directly or indirectly, to obtain or compel said Controller or Deputy Controller, or auditing officer, to issue and deliver any order or warrant for payment of money, or against the Treasurer, Assistant Treasurer, or any officer or officers charged with the disbursement of the moneys of the city of New Orleans, the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the city of New Orleans to any person, persons, corporation or corporations whatsoever, but all actions or proceedings for the recovery of any sum of money claimed to be owing by the city of New Orleans shall be in the ordinary form of action, instituted against the city of New Orleans as a corporation, and not against any branch, department or officer thereof, and shall, in all respects, be conducted in the same manner as other ordinary actions.

SEC. 2. *Be it further enacted, etc.*, That hereafter no writ of execution or *fieri facias* shall issue from any of the courts in this State against the city of New Orleans to enforce the payment of any judgment for money against the city of New Orleans, but *final* judgment against the city of New Orleans, condemning said corporation to pay any sum in money, when the same shall have become executory shall have the effect in law of establishing and fixing the amount of the plaintiff's demand against said corporation, and the plaintiff may cause (a certified copy of the said judgment, together with a copy of the plaintiff's petition and the defendant's answer in the cause in which such judgment is rendered, together with the certificate of the clerk of said court that such judgment is final and executory), to be filed in the office of the Controller of said city, and it shall be the duty of the Controller or auditing officer of said corporation to receive the same and cause the same to be registered in his office of the date on which the same shall have been presented, and when so registered it shall be the duty of the Controller to warrant on the Treasurer or disbursing officer of the corporation for the amount due thereon without any special appropriation of money therefor by the Common Council; *provided, always*, that there be sufficient money in the treasury to pay such judgments specially designated and set apart for that pur-

pose in the annual budget or detailed statement of items of liability and expenditure required to be made by the one hundred and twenty-fourth section of the act of the Legislature, entitled an act to amend an act entitled "An Act to consolidate the city of New Orleans and to provide for the government of the city of New Orleans and the administration of the affairs thereof," approved March 20, 1856, or such laws as may be hereafter enacted relating thereto.

SEC. 3. *Be it further enacted, etc.*, That in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans at the date when any judgment against the said corporation shall have been final and executory shall have been exhausted, the Common Council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum of money to pay said judgment or judgments, but if no such appropriation be made by the Common Council, then all judgments shall be paid in the order in which they shall be filed and registered in the office of the Controller from the first money next annually set apart for that purpose.

SEC. 4. *Be it further enacted, etc.*, That if, by reason of the failure of the Controller or the auditing officer of the city of New Orleans, or of the Treasurer or disbursing officer of said corporation to perform his duty, or if, by reason of the neglect or malfeasance of them, or either of them, any person, persons, corporation or corporations, shall be unjustly delayed in the payment of any judgment or demand against the city of New Orleans, or shall not be paid in their due and regular order in which such demands are entitled to be paid, and shall be prejudiced and suffer loss and damage thereby, or by reason of any unjust preference to other creditors, such person, persons, corporation or corporations so injured by the act of either of said officers, shall have a right of action against such officer or officers individually, by whose act or acts he or they have suffered loss and damage, and against the surety or sureties on the official bond of such officer, and may recover damages therefor against said officer and sureties for such amount as they may establish on the trial of such cause.

SEC. 5. *Be it further enacted, etc.*, That this act take effect and be in force from and after its passage, and that all acts and parts of acts in conflict with this act be and are hereby repealed, in so far as the same conflict with any of the provisions of this act.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved, March 17, 1870.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
GEO. E. BOVEE,
Secretary of State.

No. 133.] AN ACT

To liquidate the indebtedness of the City of New Orleans, and to apply its assets to the satisfaction thereof; to create a board of liquidation, and prescribe their duties; and to provide for a fiscal agent and for the levying of a sufficient tax to pay said interest.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That for the purpose of liquidating, reducing and consolidating the debt of the city of New Orleans, as hereinafter specified, a permanent syndicate of six citizens of the said city is hereby created. The said syndicate shall be chosen as follows: two by the Governor of the State of Louisiana, two by the Lieutenant Governor, and two by the Speaker of the House of Representatives, and the Mayor of the City of New Orleans, the Treasurer and the Controller thereof, as hereinafter provided, shall be *ex-officio* members of said syndicate; *provided*, that in case no change is made in the present city government, the present commissioners of the consolidated debt shall act as *ex-officio* members of said syndicate, and the members of the syndicate so named shall fill all vacancies in their number from death, resignation or otherwise.

SEC. 2. *Be it further enacted, etc.*, That the commissioners of the consolidated debt, or the city officers provided and named in section 1 of this act, and the *syndicate hereby created, shall* constitute a board of liquidation of the city debt, and the said board shall have exclusive control and direction of all matters relating to the bonded debt of the city of New Orleans. The board of liquidation shall cause to be prepared bonds of the city of New Orleans, which bonds shall be used only for the purpose of negotiation or of exchange, as hereafter provided. The said bonds shall be signed by the Mayor and countersigned by the Administrators of Accounts and of Finance, or such officer or officers as may be hereafter created to fill their respective functions. They shall be made payable in fifty years from the day of the approval of this act, and bear interest at the rate of four per cent. per annum, from the date of said bonds, payable, semi-annually, on the first day of April and October of each year, said interest represented by one hundred coupons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most convenient by the board of liquidation, and be made payable at such place or places as may be designated in the bond; but the said bonds shall be made payable, interest and principal, in lawful money of the United States; and the said board of liquidation shall be and it is hereby empowered and authorized to establish in New York, London, Paris and Amsterdam, such agencies as they may see fit and desirable.

SEC. 3. *Be it further enacted, etc.*, That the board of liquidation of the city debt be and it is hereby authorized and empowered to retire and cancel the entire valid debt of the city of New Orleans, except the floating debt created up to the date of the passage of this act, whether represented by bonds of various classes or by judgments, either by the sale of the new bonds created under this act

and appliance of proceeds to the purchase of such old obligations, or by exchange of the new bond against said old obligations, on such terms as may be agreed upon between the holders of the said old obligations and the board of liquidation; *provided*, the new bonds shall not be sold for a less sum than eighty cents, in cash, on the dollar, and that no exchange shall be made at a greater rate than fifty cents in new bonds per one dollar of the face value of the old obligation with interest accrued thereon; *and provided, further*, that the entire issue of new bonds sold or exchanged, as above provided, shall not exceed in all ten millions of dollars.

SEC. 4. *Be it further enacted, etc.*, That should any obligation of the city of New Orleans be deemed fraudulent or invalid, by any member of the board of liquidation, the same shall not be purchased, exchanged or retired until the holder of the same shall have applied to the proper court for relief, when, if final judgment be in his favor, it shall be deemed to be a valid obligation of the city; and should any member of the board of liquidation knowingly audit, fund, purchase or retire, for value, any illegal obligation of the city of New Orleans, or shall use any of the bonds herein authorized, or the proceeds thereof, or any of the city's assets or property in the hands of the board, by virtue of this act for purposes other than those contemplated in this act, he shall, on conviction thereof, be punished by fine of not less than one thousand dollars and imprisonment at hard labor for not less than one year.

SEC. 5. *Be it further enacted, etc.*, That it shall be the duty of the city authorities, as soon as possible after the organization of the board of liquidation of the city debt, to turn over and transfer to the said board all the property of the city of New Orleans, both real and personal, not dedicated to public use, and the board of liquidation shall be and is hereby empowered and authorized to dispose of said property on such terms and conditions as may be deemed favorable; the proceeds of such sale or sales to be deposited with the fiscal agent of the board at credit of "city debt fund."

SEC. 6. *Be it further enacted, etc.*, That nothing in this act shall be construed as affecting or in any manner impairing the Act 31 of 1876, commonly known as the "Premium Bond Act," but it will be the duty of the city authorities to turn over and transfer to the board of liquidation of the city debt all moneys collected on account of the tax levied in accordance with the provisions of the premium bond act; and it shall be the duty of the board of liquidation to apportion the proceeds of said tax and apply the same *pro rata* and in the proportion which each form of bonded debt shall bear to the entire amount of the city's debt; and such portions of the said proceeds of tax as shall not properly belong to the outstanding amount of premium bonds shall be applied to the payment of interest on the bonds created under this act.

SEC. 7. *Be it further enacted, etc.*, That it is hereby made a felony, punishable, on conviction, by fine not exceeding five hundred dollars, and imprisonment at hard labor not exceeding ten years, for the fiscal agent or any member of the board of liquidation of the

city debt to divert or misappropriate any portion of the debt and interest fund herein created from its legitimate channel, as provided.

SEC. 8. *Be it further enacted, etc.*, That the surplus arising from the collection of the debt and interest tax, or from the sale of assets in the hands of the board of liquidation of the city debt, after paying the interest coupons of the bonds issued under this act, shall be used for the purchase and retirement of any valid bonds of the city of New Orleans heretofore created at the rate not exceeding fifty cents per dollar, or, at the discretion of the board, for the retirement of the bonds created under this act at a price not exceeding par; and the bonds or obligations purchased, exchanged or retired shall be canceled and destroyed by the said board of liquidation, after public notice of the same shall have been given in the official journal of the city of New Orleans, and in the presence of such witnesses as may desire to attend. A *proces verbal* of the same, giving the amounts, numbers, dates and other particulars, for identification of the obligations destroyed, shall be made out and sworn to by a majority of the board of liquidation, and published within ten days of such destruction in the official journal of the city of New Orleans.

SEC. 9. *Be it further enacted, etc.*, That the board of liquidation is required and empowered to open, keep and regulate a special book of registry of bonds of the consolidated bond series of 1880, as follows, to wit: Any holder or owner of any of the former or old bonds of the city, issued previous to the passage of this act, upon surrendering the same for cancelment, according to the provisions of this act, shall be entitled to have the amount and number of bonds due him registered in said book, in such manner and form as the board of liquidation may determine and prescribe, whereupon, instead of giving to said party a new bond, as contemplated by the preceding sections of this act, the board of liquidation shall grant to such party a certificate of registry, in such form as said board of liquidation may determine and prescribe, and said certificate to be transferable, in person or by proxy, on the records of the books of the board of liquidation, and the semi-annual interest on the amount of said certificates, instead of being represented by interest coupons, shall be payable to such party or his order in such form and manner as said board of liquidation may determine and prescribe; and the city of New Orleans shall cause a sufficient number of blank certificates of registry to be printed or engraved in the form and manner prescribed, and shall deliver said blanks to the board of liquidation, to be used agreeably to this section.

SEC. 10. *Be it further enacted, etc.*, That it shall be the duty of the Council of the city of New Orleans to provide a proper office for the board of liquidation of the city debt; but the expenses of engraving, printing and issuing the bonds created under this act, and all the necessary clerical and office expenses, shall be paid out of the funds appropriated and belonging to the payment of interest and principal of said bonds, *provided*, that no member of the board of liquidation shall receive any salary or emolument of any kind for his services therein.

SEC. 11. *Be it further enacted, etc.*, That the City Council be and is hereby required to levy an annual tax, calculated upon the assessment of the preceding year, less twenty per cent., sufficient to pay in full the interest on all the bonds issued under the provisions of this act, and any tax levied shall continue in force until superseded by a new levy for the same purpose.

SEC. 12. *Be it further enacted, etc.*, That all parts of all laws in conflict with this act be and the same are hereby repealed.

(Signed) R. N. OGDEN,
Speaker of the House of Representatives.

(Signed) S. D. McENERY,
Lieutenant Governor and President of the Senate.

Approved, April 10, 1880.

(Signed) LOUIS A. WILTZ,
Governor of the State of Louisiana.

A true copy:
WILL. A. STRONG,
Secretary of State.

No. 67.] AN ACT

To amend and re-enact Sections 2, 3 and 5, of an act entitled "An Act to liquidate the indebtedness of the city of New Orleans, and to apply its assets to the satisfaction thereof; to create a Board of Liquidation, and prescribe their duties; and to provide for a fiscal agent, and for the levying of a sufficient tax to pay said interest," approved April 10, 1880; and to further provide for the redemption of the bonds authorized herein, the payment of the interest on the same, when said tax is not levied; and for the disposition and sale of said assets and other property.

WHEREAS, Due notice of the introduction of this act has been given, in accordance with Article 48 of the Constitution; and,

WHEREAS, The legislation heretofore enacted, under article 254 of the Constitution of the State, providing for the liquidation of the indebtedness of the city of New Orleans, has in part proved inoperative;

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That Section 2, of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the commissioners of the consolidated debt, or the city officers, provided and named in Section 1 of this act, and the syndicate hereby created, shall constitute a Board of Liquidation of the city debt, and the said board shall have exclusive control and direction of all matters relating to the judgment and bonded debt of the city of New Orleans. The Board of Liquidation shall cause to be prepared bonds of the city of New Orleans, which bonds shall only be used for the purpose of negotiation or exchange, as hereinafter provided. The said bonds shall be signed by the Mayor and Treasurer of the city of New Orleans, and countersigned by the Controller of said city; they shall be dated June 1, 1884, and be made payable in fifty years from said date, or sooner, at the option of the city, and bear interest at the

rate of five per cent per annum from the date of said bonds, payable semi-annually on the first days of June and December of each year; said interest to be represented by one hundred coupons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most convenient by the Board of Liquidation, and be made payable at such place or places as may be designated in the bond, but the said bonds shall be made payable, interest and principal, in lawful money of the United States.

SEC. 2. *Be it further enacted, etc.*, That Section 3, of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the said Board of Liquidation of the city debt be and it is hereby authorized and required, and it is made the duty of the said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered, under the provisions of Act No. 5, of 1870, and that which hereafter may become merged into executory judgments and likewise registered; except the floating debt or claims created for and against the year 1879, and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments, at present rendered against such city, and to such floating debt or claims against said city for 1878, and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years, previous to the year 1879; that for the purpose of retiring and canceling said judgment debt, the said board is authorized and required either to sell the bonds to be issued under this act at not less than their par value and apply the proceeds thereof to the payment of the said judgments, as above specified, or issue said bonds in exchange for said judgments.

SEC. 3. *Be it further enacted, etc.*, That Section 5 of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That it shall be the duty of the city of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this act, all property of the city of New Orleans, real and personal, not dedicated to public use; *provided*, that in the sale of batture property, which is herein included, the right of the city to all future accretions shall be reserved, all assets of said city realized, and to be realized, except such assets and revenues as pertain to the administration of said city, and necessary for the support of the same as at present authorized, all uncollected revenues of said city anterior to the year 1879, when collected; and the said board is hereby authorized and required to dispose of said property and assets, other than stock held in corporations, on such terms and conditions as said board may deem to be to the best interests of the city, and apply the proceeds thereof, together with the uncollected revenues above mentioned, when the same are collected: First, to the payment of the interest on the bonds authorized herein in the event that the tax authorized by section eleven of said Act No. 133, approved April 10, 1880, be not levied; Second, to the redemption and cancellation of the said bonds; *provided*, that bids for the sale of the

same shall be by sealed proposals, and that preference shall be given to the lowest bidder; and *provided further*, that no bids above the par value of said bonds shall be accepted.

SEC. 4. *Be it further enacted, etc.*, That for the further redemption of said bonds the said Board of Liquidation is hereby authorized and required after each and every allotment of series following the passage of this act, to advertise for sealed proposals for the exchange of drawn premium bonds in possession of the city for the bonds authorized herein to the amount of fifty thousand dollars, of said bonds issued under this act; *provided*, that no exchange be made unless preference be given to the lowest bidder.

SEC. 5. *Be it further enacted, etc.*, That nothing shall herein be construed as in any manner affecting or interfering with the disposal of property of said city, created under the provisions of Act No. 33, approved March 31, 1877, otherwise than is provided for in section 14 of said act.

SEC. 6. *Be it further enacted, etc.*, That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCH,
Lieutenant Governor and President of the Senate.

Approved 9th July, 1884.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy from the original:
OSCAR ARROYO,
Secretary of State.

No. 31.] AN ACT

To adjust, regulate and provide for the bonded debt of the city of New Orleans; to authorize the exchange of bonds of the city of New Orleans for other bonds, to be issued on the plan known as the premium bond plan; to adopt and give legislative sanction to the said plan, as set out in ordinances Nos. 3130 and 3233, Administration Series of the city of New Orleans, approved on May 25 and August 31, 1875; to provide a fund to meet the semi-annual payments of the said bonds, known as premium bonds; to create a commission in the interest of creditors, and to give said commission the direction, control and management of the semi-annual allotments under said premium bond plan; to limit by contract the contracting of debt by the city of New Orleans; to limit taxation for all purposes therein, and to give relief to arrear taxpayers; to provide for the exchange of said premium bonds for other bonds in a certain contingency.

SEC. 6. *Be it further enacted, etc.*, That it shall be the duty of the City Council, in the month of December of each year, or in the annual budget annually adopted for the ensuing year, to include an amount sufficient to meet and pay the principal and interest of the premium bonds, together with premium included, in the several allotments of series and premiums fixed for such year by the aforesaid ordinances and this act. It shall be the duty of the Council annually to levy an equal and uniform tax on all assessed property

within the corporate limits of the city, at a rate sufficient to provide the amount included in the budget as aforesaid, and said tax so levied shall constitute a special fund to be used for no other purpose than the payment of said bonds and interest on the said premiums comprised in said allotments, and the funds so raised shall be placed to the credit of an account to be called the premium bond account, and no money from said fund shall be paid out except on the joint authority of the commissioners of the consolidated debt. The said tax so to be raised shall be denominated the premium bond tax, and shall be separately mentioned in the tax rolls and receipts; *provided*, that the taxable power of the corporation of the city of New Orleans, for all purposes, including general administration, school, police, lighting, salary of officers, court expenses, and every other purpose of government, including the sum to be raised to pay the premium bonds, as above stated, shall never, until the full, complete and final payment of the said premium bonds, exceed the rate of one and one-half per centum on the dollar of all the assessed value of property subject to taxation within the limits of the said city of New Orleans. The above limitation of the taxable power of the corporation is hereby declared to be a contract, not only with the holder of the said premium bonds, but also with all residents and taxpayers of the said city, so as to authorize any holder of said premium bonds, resident or taxpayer, to legally object to any rate of taxation in excess of the rate herein limited. It being also a part of the consideration of this contract that the city of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the constitution of this State, until the final payment and extinction of the premium bonds aforesaid.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved March 6, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

P. G. DESLONDE,
Secretary of State.

167-467

167-467

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~831~~ 282.

JOHN D. WARNER, *Appellant*,

versus

THE CITY OF NEW ORLEANS, *Appellee*.

Brief of Complainant.

RICHARD DE GRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.

L. GRAHAM & SON, LTD., 44-46 BARONNE ST., NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 631.

JOHN D. WARNER, *Appellant*,

versus

THE CITY OF NEW ORLEANS, *Appellee*.

Brief of Complainant.

STATEMENT OF THE CASE.

This case is certified from the United States Circuit Court of Appeals, for the Fifth Circuit, under the 6th section of the act entitled "An Act to establish Circuit Courts of Appeals and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, for instructions on two questions which will be specially discussed hereafter, and [illegible] tificate from that court are sent copies of its record [illegible] acts of the Legislature of Louisiana relating to the [illegible] embraced in said suit, and the briefs filed and used [illegible] court.

The facts, as appear from the matters certified and from the record sent up as aforesaid are as follows:

On the 7th of June, 1876, and for [illegible] thereto, Warner Van Norden was the owner of [illegible] implements, machines, boats and apparatus for [illegible]

sive drainage work, and he was also the transferee and pledgee of the exclusive privilege of the Mississippi and Mexican Gulf Ship Canal Company, granted under Act No. 30 of the year 1871, for draining and reclaiming portions of the parishes of Orleans and Jefferson, embracing the cities of New Orleans, Jefferson and Carrollton, and while he was thus owner, transferee and pledgee, the Legislature of the State of Louisiana vested the Common Council of the city of New Orleans, on the 24th day of February, 1876, by Act No. 16, duly approved on that day, with the necessary authority to buy him and said Canal Company out, in case said Common Council deemed it advisable to make said purchase.

The discretion thus given was duly exercised by said city, and in accordance with the terms of said legislative act, an appraiser—the city surveyor—was duly appointed, "to estimate the value of the rights and things to be purchased and settled for," and an appraisement was duly made and a notarial act of sale entered into, whereby the city of New Orleans acquired from said Van Norden all of his property, rights and apparatus for draining, and all the rights of said Canal Company, which he then held as transferee and pledgee, which transfer and pledge to him of the exclusive [illegible] of doing drainage work by said Canal Company had [illegible] recognized by the Legislature of said State by joint [illegible] approved February 24, 1876, and by the Supreme [illegible] of said State, by decision rendered in the suit entitled [illegible] ex rel. Van Norden vs. Mayor and Board of Ad[illegible], etc., 27 La. An. R. 499.

[illegible] and settlement was made in consideration of [illegible] warrants given for the property sold [illegible] of New Orleans, and $20,000 in [illegible] of claims for damages [illegible] said city, which war[illegible] authorizing said pur[illegible] form as those issued [illegible] Act No. 30 of the year [illegible] of drainage tax assess-

To the above act of sale the said Mississippi and Mexican Gulf Ship Canal Company was a party, and by the terms thereof, all of said warrants were delivered by said company to New Orleans to said Van Norden, who delivered the property sold to said city, which she duly received, has ever since retained, and never offered to return, and has never paid one cent of the drainage warrants given therefor, which were payable from drainage taxes, of which the said city was the collector and trustee, and the collection of which she bound and obligated herself in a covenant in said act of sale contained as a part of the consideration of said sale "not to obstruct or impede, but on the contrary to facilitate by all lawful means * * * until said warrants shall be fully paid, it being well understood between said parties that the collection of drainage assessments would not be diverted from the liquidation of said warrants * * * under any pretext whatsoever until the full and final payment of the same."

The above drainage tax assessments were provided for and levied as follows: In the year 1858 the Legislature of said State, by act approved March 18 of that year, provided for the drainage of certain portions of the parishes of [illegible] Jefferson, which it divided into three districts [illegible] which, under subsequent legislation, [illegible] added). The work was to be accomplished [illegible] instrumentality of commissioners for [illegible] powers and duties were defined, and who were [illegible] tain plans of the property to be drained, [illegible] the owners thereof, file them in certain [illegible] which certain notices were to be published [illegible] judicial proceedings were to be had in certain [illegible] that the land to be drained be drained [illegible] gage lien and privilege in favor of said [illegible] such an amount as might be assessed upon [illegible] its proportion of the cost of draining the [illegible] gage lien and privilege was to be preserved [illegible] gage office, and was to take precedence [illegible] liens and privileges, and attach to the property [illegible]

amount assessed should be paid in full. Thereafter it was the duty of said commissioners to levy assessments on said property, payable from time to time as necessity might require, and for the non-payment of which judgment might be sold according to law. By act approved March 1, 1861, a more summary mode was provided for the collection of said taxes. As soon as the assessment was made, notice thereof was to be given, tableaus or assessment rolls were to be prepared, giving a description of the land, the names of the owners where known (where unknown the fact was to be stated), and the amounts assessed, which were to be filed in certain designated courts with a petition praying for the homologation of said rolls, and which, after due publication of notice were by said courts to be approved and homologated, and this approval and homologation said act declared should be a judgment against the property assessed, and the owners thereof, on which execution might issue as on judgments rendered in the ordinary course of proceedings.

Commissioners were duly appointed in the first and second drainage districts, and they respectively procured judgments to be rendered declaring said mortgage to exist in said districts, recorded the same in the proper mortgage offices, levied assessments in said districts and prepared the proper assessment rolls for said districts and caused judgments to be rendered homologating the same in the first district for the first instalment thereof, and in the second district for the full amount of said assessment.

In this condition of things, in the year 1871, the Legislature of the State passed Act No. 30 of that year, which abolished said board of commissioners, transferred all their rights, powers, duties and facilities, all books, papers, documents, property, assessments and judgments to the Board of Administrators of the City of New Orleans, who were directed to collect all unpaid assessments, and make and collect [illegible] where none had been levied, and especially [illegible] within the limits of certain protection [illegible] and directed to be built (which land was subsequently declared to be [illegible] drainage district), and it

provided that all drainage should thereafter be done by the Mississippi and Mexican Gulf Ship Canal Company, whose compensation and the manner of payment were provided for, to-wit by the issuance and delivery of drainage warrants drawn against said drainage taxes, which warrants were to be paid on presentation if the necessary funds were on hand, and if not, they were to bear interest at the rate of 8 per cent. per annum from the date of presentation, which date was, in case of non-payment, to be endorsed on said warrants.

Thereafter said Board of Administrators procured decrees of mortgage to be rendered on the land in said third and fourth drainage districts, and to be recorded in the proper offices, assessments to be levied, the proper assessment rolls to be prepared, the proper judicial proceedings to be had and judgments of homologation to be rendered approving said assessments in said districts (as well as the preparation and homologation of the assessment roll in said first district from the second to the tenth instalment thereof), all of which assessments, in all of said districts, it was the duty of said Board of Administrators to collect and hold for drainage purposes.

Said canal company accepted the provisions of said act No. 30 of the year 1871, commenced and carried on said drainage work until May, 1872, when it transferred all its rights, title, interest, claim and demand in and to the privileges and advantages granted to it under said act No. 30 of the year 1871, to Warner Van Norden, and thereafter, in November, 1872, said canal company sold and delivered to said Van Vorden all of its tools, machinery and appurtenances, and thereafter he carried on said drainage work as the transferee of said company to the date of the sale aforesaid (June 7, 1876), when about two-thirds of the work contemplated by said act had been completed, and about 5,000,000 cubic yards of earth excavations had been made.

The whole amount of drainage assessments that came under administration by said Board of Administrators of the city of New Orleans, was $1,[illegible]39,637.37, and of this amount $[illegible]003,342.28 was assessed against individuals, and $[illegible]

against the city of New Orleans on the area of her streets and squares, and up to the time of said sale the city had collected from assessments against private property $229,922.89 leaving outstanding and uncollected on the drainage records, in the mortgage offices and on the records of the courts, $1,469,-714.47, at which time the city owed the full sum of $969,-324.30.

The drainage warrants issued prior to December 31, 1874, for drainage work done, had been paid or taken up prior to said sale by the issue of bonds of the "Drainage Series" to the amount of $1,672,105.21 (or an amount $202,390.74 more than the total amount of drainage taxes at said time outstanding), under the authority of Act No. 73 of the Legislature of Louisiana of the year 1872, but these bonds of the "Drainage Series" were at all times secondary in payment to said drainage warrants, for the 13th section of said act under which they were issued, after providing for their issue, further provided that "all taxes collected for drainage and not required for the payment of drainage warrants shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

Complainant sues on three of the drainage warrants, of [illegible] each, given for the purchase price of the drainage plant and franchise sold to the city of New Orleans as above [illegible].

The bill, after setting out the foregoing state of facts in more amplified form, avers: (1) That the city of New Orleans, after she became possessed of the drainage franchise, sold some of the drainage machinery and suffered the rest to become rotten and valueless and abandoned all work of [illegible]; that by reason of the non-completion of the drainage [illegible] the Supreme Court of Louisiana decided the [illegible] taxes could not be collected, inasmuch as no benefits [illegible] conferred on the property. (2) That the city by [illegible] impeded the collection of drainage taxes, and [illegible], ordinances and proclamations, encouraged [illegible] people to refuse to pay the assessments, by reason [illegible] the drainage assessments due by private persons

have become valueless. (3) That the city will plead that she has been discharged from all liability to account for the drainage taxes she has collected, or which she ought to have collected, but has wasted, as well as her own indebtedness, by the issue and delivery, between May 10, 1872, and December 31, 1874, of drainage bonds under authority of Act 73 of 1872. (4) That the city had never claimed, prior to the purchase of said property and franchise, that the issuance of said bonds operated as such discharge, and made no such plea, save in the case of James W. Peake vs. The City of New Orleans, filed May 19, 1888. (5) That the act of 1876 was an authority for the city to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without delay or impairment. (6) That the contract of sale was entered into by Van Norden, in consideration of the provisions of said act of 1876, and its effects upon its rights and remedies, that neither at the time of entering into the contract of sale, nor when the warrants were delivered in discharge of the price, did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants; that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised any such claim would be made as aforesaid; that Van Norden has expressly and by a writing annexed to and made part of the bill subrogated complainant to all his rights and remedies growing out of said sale (R., p. 145); the complainant therefore avers that the city is estopped in equity and good conscience from pleading or maintaining such defense.

The prayer is for an accounting of said drainage fund, and especially that the amount due by the city as assessor of the streets and squares be decreed to be a trust fund in the hands of the city, applicable to the payment of said drainage warrants.

The defendant demurred to the bill, especially asserting that the decision in the case of James W. Peake vs. The City of New Orleans, reported in 139 U. S. 342, is decisive of the issues in this case. The demurrer having been sustained by the Circuit Court, complainant removed the case to the United States Circuit Court of Appeals, assigning, among others, error in this respect.

And it appearing to that court that the suit of said Peake was based on drainage warrants given for work, all dated July 9, 1895, complainant insisted that they were issued while the city was an involuntary and non-contractural trustee, and in this respect differed from those involved in this case, which were issued by the city as a voluntary and contractural trustee under the permissive authority of the Legislature, and both on principle and owing to the estoppel pleaded in the bill, his rights were not affected by said Peake decision.

And this case having been argued in said United States Circuit Court of Appeals on the errors assigned, and that court desiring the instruction of this Honorable Court for the proper decision of the questions arising on the matter of estoppel aforesaid and the application of the decision of this Honorable Court to the issues involved in this suit, it ordered the following questions and propositions of law to be certified to this Honorable Court, to-wit :

First.

"Is the city of New Orleans bound under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchises from Warner Van Norden, and, under the averments of this bill, estopped from pleading against complainant the issuance of bonds to retire $1,672,105.24 of drainage warrants issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property, and as a discharge from her own liability to that fund for the cost of the streets and squares."

Second.

"Should the decision in the case of James W. Peake vs. the City of New Orleans, 139 U. S., p. 342, be held to apply to the facts of this case and operate to defeat the complainant's action?"

ARGUMENT.

The first question involves the consideration of estoppel in two distinct respects, viz.: first, because of the express and implied warranties contained in the act of sale, and, second, under the averments of the bill of complaint.

In the examination of these matters we will discuss the question of implied warranty first; and at the outset it must be observed that the drainage warrants in suit are the creatures of the statutes of Louisiana, are to be paid from taxes raised in Louisiana, and are to be paid in Louisiana. They are in all essentials Louisiana contracts, to be executed in Louisiana, and are therefore to be controlled by the jurisprudence of Louisiana, and it will be necessary, therefore, to determine their legal character under that jurisprudence.

The act vesting the Council of the city of New Orleans with the discretion to purchase in case it should "be deemed advisable," declared "that the amounts to be paid when agreed upon shall be paid in drainage warrants, which shall be issued in the same form and manner as those heretofore issued to the transferee of said company under Act 30 of 1871, payable out of drainage assessments."

The eighth section of said act declared that the warrant was to be drawn by the Administrator of Accounts, on presentation to him of a designated statement of the work done, on the Administrator of Finance, whose duty it was to pay the same on presentation in case there were funds on hand for that purpose, and if not he was to endorse thereon the date of presentation, and thereafter it was to bear interest at the rate of 8 per cent. per annum. The form of warrant in suit is found at page 141 of the record of the United States Circuit Court of Appeals, and in substance and effect is a check, drawn on the treasury of the city of New Orleans in favor of Van Norden.

It is, in all its essentials, like a check on a bank, drawn against a particular fund, and, unlike the check at common law, is an assignment of the fund to the extent of the amount of the check.

In Gordon & Gomilla vs. Müchler, 34 La. An., p. 605, this point was expressly decided and the distinction between the civil and common law noticed. In that case there was a triangular contest between three creditors of the defendant over a balance standing to the credit of his deposit account with the Union National Bank, viz.:

1. The Union National Bank claimed the credit was extinguished because it (the bank) was holder of a dishonored draft of defendant, and had applied the credit to the extinguishment of said debt.

2. The Louisiana National Bank claimed it as holder of a check of defendant on said Union National Bank for the exact amount of the credit, which check had been duly presented to said Union National Bank and payment thereof demanded, and, on refusal had been protested, and written notice given to said Union National Bank that it was claimed to operate an assignment of the credit.

3. Gordon & Gomilla claimed the fund by virtue of an attachment thereof after the above proceedings.

After disposing of the claim of the Union National Bank adversely to its pretentions, said, of the claim of the Louisiana National Bank, as follows:

"It will not be disputed that a written order by a creditor addressed to his debtor, directing him to pay to a third person [illegible] due the former, accompanied by due notice to the [illegible] comply with all the requirements imposed by [illegible] Arts. 2640 to 2654, for the valid giving of title, [illegible] assignment of the credit or incorporeal [illegible] in the order.

[illegible] principles, the check, its presentation, protest [illegible] notice herein given, unquestionably ful-

[illegible] itself: on what principles shall we [illegible] the effect which is given to [illegible]

[illegible] Case vs. Henderson,

23 An., p. 49, it was held that the check holder did not acquire a right of action against the bank upon the authority of the Supreme Court of the United States, in Bank vs. Millard, 10 Wallace, p. 153. That was a case at law, in error to the Supreme Court of the District of Columbia, where the common law prevails: 1. That there was no privity of contract between the bank and the check holder at the time the check was drawn, and 2. That no such privity was created by mere presentation of the check, without acceptance by the bank, because the depositor's right was a mere *chose in action* not assignable without the consent of the debtor.

"*Choses in action* correspond substantially to, or at least are included within the civil law definition of *incorporeal* rights; our law differing therein from the common law distinctly recognizes the assignability of that class of incorporeal rights known at common law as *choses in action*, and provides for the perfectability of such assignments by notice to the debtor and independent entirely of his consent, and from the [illegible] of such notice creates a privity between the debtor and the assignee, amounting to a perfect legal title. It follows that the reasons underlying the common law decisions quoted have no application or existence under our law, and the decisions therefore have no application as authority here.

"In a very recent case decided by Justice Miller on circuit, it was held that a check, duly notified to the bank, constituted an assignment of the fund drawn against, which a court of equity will enforce in favor of the checkholder, although a court of law will not. Bank vs. Coates, [illegible] had the check in the instant case been drawn in a [illegible] State upon a bank in such State, so that the [illegible] check holder would have been regulated by *lex loci* [illegible] yet if the action thereon had, by any means, been [illegible] our forum, our courts would have [illegible] the *equitable* rights of the check holder, and would [illegible] tained the assignment. Jackson vs. Tiernan, [illegible] Here the check and notice operate, not merely an equitable, but equally a perfect legal assignment."

All that was necessary to complete the assignment of the drainage tax to the amount represented by the [illegible] warrants given in discharge of the purchase price was [illegible] debtor, and this notice was given in case of [illegible] signment or transfer, when such warrant, [illegible] ment was presented for payment, and not [illegible]

and date of presentation was endorsed thereon by the administrator of finance.

Even under the common law these drainage warrants being orders or checks drawn against a particular fund, specially appropriated to their payment, the courts of Great Britain would hold they were an assignment of that fund. (Citizens Bank of Louisiana vs. First National Bank, Law Reports 6, House of Lords 322; English Reports, 7, Moak 56.)

These drainage warrants being an assignment of the drainage tax, the question is where is the warranty? Under the title of the Civil Code relating to the "Assignment or Transfer of civil credits and other incorporeal rights," Art. 2646, says:

"He who sells a credit or an incorporeal right *warrants* its existence at the time of the transfer, though no warranty be mentioned in the deed."

The warranty exists though no warranty be expressed in the instrument of transfer. Tyler vs. Swayze, 2 An. 880. Even in case of stipulation of no warranty, as "an assignment without any recourse or claim whatsoever against the vendor"—the seller, in case of eviction, is liable for the restitution of the price, unless the buyer was aware, at the time of the transfer, of the danger of eviction—that is, was aware that any realization on the transfer was a mere matter of hazard and chance—and purchased at his peril and risk. Civil Code 2505 provides as follows:

"Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction, and purchased at his peril and risk."

See also Corcoran vs. Riddle, 7 An. 268; Jenkins vs. The Parish of Caddo, 7 An. 559; Johnson & Co. vs. Boise & Frelsen, 40 An. 273. In the latter case it was decided that when a transferor of a judgment sells all his *rights* to it, and to all suits growing out of it, he *warrants the existence* of the debt at the time of the transfer, and that if the debt had been *extinguished* and was not in existence at the time of the sale—the very defence which the bill charges the defendant will set

up here—the vendor is bound for the price. That is, if the restitution or satisfaction can be paid in money, and if not, the parties are remitted to the general law regulating courts of justice in the affirmance of contracts. Art. 1937 of the Civil Code states it as follows:

"In ordinary cases the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

As was shown in Lavine vs. Mitchel, 35 An. 1121, this is in accord with the equity jurisprudence on this subject. See cases there cited, and especially Secs. 717 and 718, Story's Eq.

Each warrant was, therefore, under the law of Louisiana and the principles of the common law, an assignment in favor of the holder of so much of the drainage taxes as was necessary to pay the same, and was a warranty also that the drainage tax fund existed out of which to pay it. Surely, after this assignment warranty of the very fund out of which the warrants are payable, the defendant is estopped from thereafter setting up any claim against said drainage tax fund by reason of the long prior issue of said bonds of the "Drainage Series." The written and expressed warranties are equally conclusive against the city of New Orleans pleading against the complainant the issue of said bonds of the "Drainage Series" to retire $1,672,105.21 of drainage warrants issued prior to said date of sale, as a discharge of her obligation to discharge for drainage tax funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares, as the certficate at page 3 shows that in the very act of sale by which she acquired Van Norden's property by a solemn covenant therein, she covenanted and agreed as follows:

"Not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of drainage assessments as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between

the parties hereto that the collection of drainage tax assessments shall not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same."

Such are the provisions of the contract under which the property was delivered for the warrants payable out of said taxes, and no amount of discussion could make the estoppel more complete. But it is not all that was contained in said act of June 7, 1876, which was not only a bill of sale of the drainage plant and franchise, but was also a final settlement between the parties thereto, whereby the city gave Van Norden $20,000 in drainage warrants in addition to those given for the purchase, because he claimed there had been a misappropriation by the city of New Orleans of drainage tax funds. Surely, if the city had any claim against said fund, and especially one that was greater than that entire fund, she would not have delivered to Van Norden this additional $20,000 in warrants to satisfy this misappropriation, but would have said the fund is indebted to me in a sum greater than all misappropriations thereof, and in fact greater than the fund itself, and I will give you nothing.

Next, as to the estoppel under the averments of the bills of complaint. These may be classed under two heads, viz.: those based on the conduct of the city of New Orleans and those based on the acts of the Legislature of the State.

The averments of the bill with reference to the conduct of the city are fully set forth in condensed form in the certificate of the United States Circuit Court of Appeals as follows:

"(1) That the city of New Orleans, after she became possessed of the drainage machinery, equipment and franchise, sold some thereof, suffered the rest to become valueless and rotten, and abandoned all work of drainage, and that by reason of the non-completion of the drainage system the Supreme Court of Louisiana decided the drainage taxes could not be collected, inasmuch as no benefits had been conferred on the property. (2) That the city by various means impeded the collection of drainage taxes, and by her conduct, ordinances and proclamations encouraged and induced the people to refuse to pay the assessments, by reason whereof the drainage assessments due by private persons have become

valueless. (3) That the city will plead that she has been discharged from all liability to account for the taxes she has collected and which she ought to have collected, but has wasted, as well as her own indebtedness, by the issue and delivery, between May 10, 1872, and December 31, 1874, of bonds of the drainage series, under Act 73 of 1873. (4) That the city had never claimed prior to the purchase of said property and franchise that the issuance of said bonds operated as such discharge, and made no such plea save in the case of James W. Peake vs. The City of New Orleans. (5) That the contract of sale was entered into by Van Norden in consideration of the provisions of the act of 1876, and its effects on his rights and remedies; that neither at the time of entering into the contract of sale nor when the warrants were delivered in discharge of the price did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants, and that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made as aforesaid."

The certificate of said United States Court of Appeals states the matter of estoppel by act of the Legislature as follows (page 4):

"That the act of 1876 was an authority for the city to make said purchase, as well as a legislative recognition that said drainage fund had not been discharged by the issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without offset or impairment."

As to the alleged non-collectibility of the drainage taxes.

The city under the bill of sale became owner of the contract and the owner and possessor of the machinery wherewith to complete the contract, with full *subrogation* of all the rights of the contractor (Record U. S. C. C. A., page 128), and after said sale she *alone* became vested with the right and power to do all works of drainage (act of the Legislature of 1876), and she became such owner and possessor, and became so vested, because of the issuance and delivery of said purchase warrants payable out of drainage taxes, and, as the

subsequent litigation shows (Davidson vs. New Orleans, 34 An. 170) the payment of said taxes was dependent on the doing of the work and the benefiting the land thereby. With this sole right and power to do this work, and the equipment and qualification wherewith to do it, there was an equity, nay more, there was an imperative duty toward Van Norden that the work should be done, to the end that the purchase warrants might be paid. The doctrine as declared by this court in Supervisors vs. United States ex rel., 4 Wall 435, is directly in point:

"Where power is granted by statute to public officers in permissive language—as they *may*, if deemed advisable, do certain things, the language used will be regarded as peremptory when the public interest or individual rights require that this should be done."

Surely, the city of New Orleans is estopped from pleading her own destruction of the drainage taxes in discharge of her duty to collect said taxes and pay the purchase warrants therewith, and especially is she estopped from pleading the non-collectibility of the taxes due by herself as assessee of the streets and squares. And she is equally estopped from pleading that said assessments are valueless, when instead of using every means to facilitate their collection, as she had bound herself to do, she has by various means impeded said collection, and by her conduct, ordinances and proclamations encouraged and induced people to refuse to pay the same.

And she is equally estopped from pleading that she has been discharged from all liability to account for the drainage taxes she has collected or which she ought to have collected, but has wasted, as well as her own indebtedness by the issuance and delivery, between May 10, 1872 and December 31, 1874, of drainage bonds under authority of Act 73 of the year 1872, because she had never claimed, prior to the purchase of said property and franchise, that the issuance and delivery of said bonds operated as such discharge, and made no such plea, save in the case of James W. Peake vs. The City of New Orleans, filed March 19, 1888, when that defence was for the first time presented by the firm of which Mr. Justice White of

this court, was then a member, in the United States Circuit Court for the Eastern District of Louisiana, as counsel for this defendant (see Record U. S. C. C. A., pp. 214 to 216), and because said contract of sale was entered into by Van Norden in consideration of the provisions of said act of 1876 and its effects on his rights and remedies, and because, that neither at the time of entering into said contract of sale nor when the warrants were delivered in discharge of the price, did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants, and because he was ignorant that the city would or could claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made.

And this ignorance of Van Norden is not only a matter of averment in the bill, but it is justified and proved by the prior judicial conduct of said city in previous litigations in the courts of Louisiana in which she was a party, and in fact the city herself believed at the time of said sale, and for many years thereafter she had no such offset or claim against the drainage fund, and this is established not only by said judicial proceedings, but by her subsequent judicial pleadings as well.

As to the prior judicial proceedings:

The judgment for the homologation of the assessment rolls in the First District (second to the tenth intalment) was rendered at the suit of the city of New Orleans, on the 21st of March, 1874 (Record U. S. C. C. A., pages 11, 54, 55 and 56), nearly two years after the issue of the bonds of the "Drainage Series" began (which the certificate says was May 10, 1872, page 3), and among the assessments so homologated were those against the city herself for $223,111.60, and yet there was no pretence of any claim of offset by reason of the prior issue of said bonds of the "Drainage Series."

The judgment homologating the assessment rolls in the Fourth Drainage District was also rendered at the suit

of the city of New Orleans on the 20th day of March, 1875, about a year after said bond issue began, and on said roll was an assessment against the city of New Orleans of $62,956.72 (Record U. S. C. C. A., pp. 114, 115), and no deduction or offset was claimed on account of the issue of said bonds of the "Drainage Series."

In May, 1875, the Supreme Court of Louisiana (27 An. 496) by mandamus directed the officers of the city of New Orleans to collect the drainage taxes in the First, Second, Third and Fourth Drainage Districts. This was several months after the *last* bond of the "Drainage Series" had been issued, and yet there is no pretence of any claim by the city of New Orleans against the drainage funds by reason of said bonds.

Next as to the prior acts of the Legislature supporting the belief that there was no claim against the drainage fund.

On the 24th February, 1874, the Legislature passed a joint resolution submitting an amendment to the Constitution of the State limiting the debt of the city of New Orleans, in which there was a proviso which declared said amendment was to be so construed as not "to prevent the issue of drainage warrants to the transferee of the contract under Act No. 30 of 1871, payable only from drainage taxes, but not otherwise."

This amendment was submitted to a vote of the people, and was adopted and became a part of the organic law of the State, going into effect on the first day of January, 1875. It stopped the further issue of bonds of the "Drainage Series," but declared said amendment was not to be construed so as to prevent the issue of drainage warrants payable out of drainage taxes, but not otherwise. The very allowance, and by the Constitution of the State, and after the last bond had been issued of the further issue of "drainage warrants payable out of drainage taxes," precludes any idea that there could be any claim against those taxes by the city of New Orleans higher in rank and greater in amount than the entire amount of taxes themselves.

And the act 16 of 1876 was also an authority for Van Nor-

den's belief that there was no offset against the drainage fund out of which his warrants were to be paid. It authorized the city to assume the exclusive control of all drainage, to purchase the rights of the canal company and Van Norden and to pay for the same in drainage warrants to be issued in the same manner and form as those theretofore issued, and made payable out of the drainage assessments. Surely this was a legislative appropriation of the drainage taxes in the face of which no one for a moment could believe, and especially when it was made for the benefit of the city of New Orleans herself, that she could have a prior claim against the same that would consume said fund entirely, or to any extent.

Such was not only Van Norden's belief, but the city herself did not at the time of said sale, or for many years thereafter, believe she had any such claim, for as late as the year 1883 she sued on drainage warrants in the United States Circuit Court for the Eastern District of Louisiana, and in said suit it was directly averred that she was indebted to the drainage fund as assessee for the sum of $677,923.90 (Record U. S. C. A., p. 171). On November 10, 1884, the city filed an answer to this suit, but there is no pretence of any claim or offset against said assessments—those due by the city of New Orleans, or as individuals, by reason of the issue and delivery of said bonds of the "Drainage Series." Such a thing was never thought of until, as before stated, this defence was made by Justice White (now of this court) and his associates in the Circuit Court of Louisiana, in said case of Peake, Record U. S. C. C. A. pp. 210 to 216.

If the city had any such claim against the drainage fund she was bound to disclose it at the time of the sale, and any concealment thereof, by silence or otherwise, was a fraud on Van Norden, and not having done so she is forever precluded from doing so thereafter.

We therefore repeat, that Van Norden had justification for ignorance of the existence of any claim against the drainage fund out of which he was to be paid, and that he had a right to believe and did believe when he parted with his property and accepted the drainage warrants therefor, that there was

a fund out of which he was to be paid without offset or impairment. To believe to the contrary is to believe that he would give away property of the value of $300,000 for nothing, because the offset is $1,672,105.11, while the sum total of all drainage taxes at the time of said sale was $1,469,714.47, or $202,390.74 less than the claim of the city. Certificate, p. 3.

The law applicable here was declared by this Honorable Court in Leather Manufacturers' Bank vs. Morgan, 117 U. S. R., pp. 108 and 109, as follows:

"The doctrine of estoppel by conduct has been applied under a great variety of circumstances. In consideration of the question before us, aid will be derived from an examination of some of the cases in which it has been defined and applied. In Morgan vs. Railroad Company, 96 U. S., pp. 716, 720, it was held that a party may *not* deny a state of things which, by his culpable silence or misrepresentations, he has lead another to believe existed if the latter has acted on that belief. 'The doctrine,' said the court, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In Continental Bank vs. Bank of the Commonwealth, 50 N. Y., pp. 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. Gaylord vs. Van Loan, 15 Wend., p. 308.' The general doctrine, with proper limitations, was well expressed in Freeman vs. Cooke, 2 Exch., pp. 654, 663, and in Carr vs. London & Northwestern Railway Company, L. R., 10 C. P. In the first of these cases it was held by Parke, B., for the whole court, that 'if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believed that it was meant, that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth and conduct by *negligence or omission* where there is a duty cast

upon a person by usage or trade or otherwise, to disclose the truth, may often have the same effect.' And in the other case, Brett, J., speaking for the court, said: 'If in the transaction itself, which is in dispute, one has lead another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has lead the other to act by mistake upon such belief, to his prejudice, the second can not be heard afterward as against the first to show that the state of facts referred to did exist.' See also Manufacturers and Traders Bank vs. Hazard, 30 N. Y., pp. 226, 229; Blair vs. Wait, 60 N., pp. 113, 116; McKenzie vs. British Linen Co., 6 App. Cas. 82, 101; Miles vs. McIlwrith, 8 App. Cas. 120, 133; Cornish vs. Abbington, 4 H. and N., pp. 549, 556."

Next as to the estoppel by act of the Legislature, approved February 24, 1876. This was clearly an authority for the city to make the purchase, and it was likewise a legislative recognition that the drainage fund out of which it provided the drainage warrants given for said purchase should be paid had not been discharged by the issue and delivery of the "Bonds of the Drainage Series," and was a dedication and an appropriation of so much thereof as was necessary to pay said warrants without offset or impairment.

This drainage tax fund was the creation of the Legislature of the State, and the city of New Orleans was likewise a creation of the same Legislature, and this same Legislature, after creating the city and the taxes and after providing for the issue of said bonds of the "Drainage Series," and after said bonds had been issued in accordance with said legislative provision, again provided that said city might buy Van Norden's franchise and plant, if it "should be deemed advisable to make said purchase and settlement," and pay said purchase price and settlement in drainage warrants, payable out of drainage assessments, which the same law directed should be issued as soon as the agreement to purchase was completed. Clearly, then, these drainage taxes being entirely under the dominion of the Legislature—the rights of no third party intervening—the act of February 24, 1876, was a new and a special dedication and appropriation of said taxes to the

payment of said warrants, and all for the benefit and advantage of the city herself, to-wit, to enable her to "alone have the power, either by its own officers and employees or by contract to the lowest bidder to do all canalling, dredging, ditching or drainage work," and to furnish and provide her with the necessary tools, implements and machinery with which to do work. Such dedication by the sovereign power of the State, and by the city acting thereunder, ranks any prior claim or pretended claim she had or could have against said drainage taxes, and especially when said pretended claim is greater than all the drainage taxes at the time outstanding, and when the application and allowance thereof would wipe out all of said taxes for her own benefit, and leave her in possession of the property of the vendor in whose favor the warrants are drawn, and said vendor nothing to pay the obligations given him. This would be not only a manifest injustice, but a fraud as well, which no court of justice would for a moment allow, for the Legislature had *full knowledge* of the amount of taxes *outstanding and the amount of bonds of the "Drainage Series" that had been issued when it passed the law of 1876* providing for said purchase and the issue of the warrants in payment of the price of said purchase. In United States vs. Des Moines, etc., 142 U. S., p. 544, this court said:

"The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge and in good faith. It is true the bill alleges that its passage was induced by the navigation company by false representations and threats of suit; but such an allegation amounts to nothing. In Cooley's Constitutional Limitations (5th Ed. 222) the author, citing several cases, observes: 'From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature, in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished and the mode of enacting it, has kept within the constitutional limits and observed constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that the legislative discretion has been properly exercised. If

evidence was required it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be deemed equivalent to such finding. And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations are established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.' See also Fletcher vs. Peck, 6 Branch, 87; *Ex parte* McCardle, 7 Wall. 506; Doyle vs. Continental Insurance Co., 94 U. S. 535; Powell vs. Pennsylvania, 127 U. S. 678."

And the city of New Orleans is likewise estopped by the 13th section of said Act 73 of the Legislature of 1872, from setting up any claim against drainage taxes to the prejudice of the payment of drainage warrants, by reason of the issue and delivery of bonds of the "Drainage Series," for said section after providing for said bonds and their issue declares:

"And all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

And these estoppels in favor of Van Norden under the law of Louisiana pass to each transferee or successive holder of drainage warrants. Article 2645 of the Civil Code provides:

"The sale or transfer of a credit includes everything which is an accessory to the same; as suretyship, privileges and mortgages."

But in addition to this, Van Norden, by instrument in writing, has made a special assignment, with subrogation of all his rights in the premises to complainant. (See Certificate, page 4, and Record U. S. C. C. A., page 145.)

We, therefore submit, that the first question propounded by the United States Circuit Court of Appeals should be answered in the affirmative.

Second.

To the question, "Should the decision in the case of James W. Peake vs. The City of New Orleans, 139 U. S., p. 342, be

held to apply to the facts of this case and operate to defeat the complainant's action?" We answer no, and for the following reasons:

1. The present suit is based on different obligations, to-wit: on drainage warrants given for the purchase of property, under a special and different act of the Legislature authorizing said purchase, and designating and appropriating the fund out of which the purchase price was to be paid.

2. The present suit is also based on an assignment from Van Norden, the vendor of said property, to whom said purchase warrants were issued, which places complainant in possession of all the rights and rights of action which said Van Norden had or might have under said act of sale of June 7, 1876.

3. The relation of the city of New Orleans toward the drainage fund since said act of the Legislature approved on the 24th of February, 1876, and since the act of purchase made thereunder *changed* from that of involuntary and compulsory trustee to that of a voluntary and contractural trustee, and in this suit she is asked to act and sought to be held as such voluntary and contractural trustee.

4. The duties and obligations under said act of February 24, 1876, and the act of sale passed in pursuance thereof, are different from those under Act No. 30 of 1871, in that under the former said duties and obligations are placed directly on the municipality of the city of New Orleans, whereas under the latter they were placed on the Board of Adminstrators of said city.

1. By reference to the certificate herein, pages 3 and 4, and by reference to a copy of the bill of sale in this cause, pp. 14 and 19, Record U. S. C. C. A., it will be seen that the warrants which are the basis of this suit were given for the purchase of the property of which Van Norden was owner, and property of which he was transferee and pledgee, while the warrants which are the basis of the Peake suit, it will be seen by reference to a copy of the bill in that case, which is made part of the bill in this case (pages 196 and 197, Record U. S. C. C. A.) were warrants Nos. 115, 116 and 122, dated July 9,

1875, and were issued for work and labor done under Act No. 30 of 1891, and they are therefore controlled by the legislation and the rights of the parties as they stood prior to February 24, 1876, under which the city made said purchase from Van Norden and the Canal Company of all their rights and property, with full subrogation, and alone became possessed of the power of drainage, etc., which act, as we have seen, was a new and special designation, dedication and appropriation of the drainage taxes as they stood at the date of said sale on the drainage records, subject to no offset or impairment whatever. The doctrine of *stare decisis* does not apply here.

2. This suit is also on an assignment from Van Norden to complainant, which was not in existence when the Peake case was filed in the Circuit Court or when it was heard on appeal in this Honorable Court. In the Peake case this court held that when the city bought out Van Norden and abandoned the drainage work, no speculative, contingent or future liability arose in favor of third parties—that the city having purchased, it had a right to abandon the drainage work, and the creditors of the contractor could not charge the city as a debtor on the theory that if the work had been completed their claims would have become of value. To meet this conclusion, complainant procured from the contractor an assignment, which, after reciting that when Van Norden parted with his warrants for value he believed he had transferred and intended to transfer to each subsequent holder thereof all the rights and rights of action that could or did at any time or in any manner enure to him as vendor thereof, as well as all rights of action that might accrue in his favor from said act of sale, or from the conduct of the city of New Orleans under said act of sale, or its violation of duty thereunder by reason of any act of omission or commission that said city may have been guilty of under said act of sale, or that might have accrued in any other manner, assigns, transfers and sets over, with full subrogation, to complainant, for himself and all other holders of drainage warrants, each, any and all actions and rights of action against the city of New Orleans which he

had or thereafter had or might thereafter have, and in said assignment declared that the purpose thereof was to place the holders of said drainage warrants, or any of them, through the said complainant, in his place and stead, and entitle them to any and all the rights that he ever may have had or then had in, to or under said warrants or said act of sale, or in any other manner, against the city of New Orleans or any other parties whomsoever. The complainant being subrogated to all the rights of Van Norden, the question then is, what rights did he have in the premises? Did he have a right to the completion of the drainage system? This we think we have already shown, or that he had a right to the completion of some system, and to the collection of the drainage taxes (certainly that they should not be destroyed by the city), and the payment of his warrants from said collections, and these rights, among others, this complainant has under the assignment aforesaid. Certificate, page 4, Record U. S. C. C. A., pages 145, 146.

It is true that the question as to whether, if the work had been done, the lands would have been drained and made valuable, was discussed in the Peake case, and that the court declared the evidence was far from satisfactory on that point, but the court put its decision on another ground, to-wit: that the only party who had a right to complain of the conduct of the city was not Van Norden's creditors, but Van Norden himself, who now through complainant, his assignee, complains and seeks redress therefrom; but in the preparation of the Peake case this question was but incidentally entered upon, as it was believed the city was indebted to the drainage fund on an assessment on its streets in an amount sufficient to pay the class of warrants upon which that suit was based, to-wit: work warrants. But whatever deficiencies or omissions there were in the evidence in that case on this point, they are fully supplied in the averments of the bill in this case, which sets out the plan in detail and shows that if completed it would have rendered the land fit and valuable for either agricultural, residence or business purposes, and made it many times the value of all drainage taxes as imposed

thereon, and said taxes collectible and available for the payment of said purchase warrants. Record U. S. C. C. A., pages 19, 20, 21.

3. And since the purchase on the 7th of June, 1876, pursuant to said act of Legislature approved February 24, 1876, the city of New Orleans ceased in any manner to be an *involuntary and non-contractural* trustee—as she was declared in said Peake case to be—and from said date became a *voluntary and contractural* trustee. Said act gave *permission* to the city of New Orleans to buy, but it did not *compel* her to buy out Van Norden and the Canal Company. She was vested with *discretion* and power to buy, but nothing more. The first section authorized the purchase, the second declared that in case it "should be *deemed advisable* by said Council to make said purchase and settlement" she should provide for the appointment of appraisers, to appraise the value and rights of the property to be purchased, etc. It was a matter of the clearest *discretion and volition* that runs through the act, and nothing more. In the exercise of this *discretion and volition* the city appointed the sole appraiser (who was her own Surveyor. Record U. S. C. C. A., p. 134), who made the appraisement, and in the exercise of the same *discretion* she made the purchase in question, and she did one thing more. She *voluntarily* entered, as already stated, into a solemn covenant whereby she contracted—

"Not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of the drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that the collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same." Certificate, p. 3.

All of which is directly the opposite of the relation that existed between said city and Van Norden when the warrants in the Peake case were given and where there was no covenant voluntarily entered into as there is here not to divert the drain-

age tax assessments under any pretext whatsoever until the full and final payment of the same.

4. The duties and obligations under act of February 24, 1876, and the act of sale were placed directly on the municipality of New Orleans, and not on the Board of Administrators, as under Act No. 30 of the year 1871.

The latter fact was stated by this court in the Peake case, 139 U. S. p. 351, as follows:

"Indeed, the statute connects rather the officers of the city than the city itself to the work. It is true the act provides that the title to the lands necessary for the works shall be procured and held for the benefit of the city of New Orleans, but it requires that such title shall be procured and held by the Board of Administrators of the city. It also provides that the nature and extent of all improvements shall be designated by such board, and that such board shall be required to build and run all works and drainage machines necessary to lift the water from the drainage canals over into Lake Pontchartrain, and to do all other work necessary to facilitate the work of the contractor selected and employed by the State. The Administrator of Accounts was directed to draw the warrants on the Administrator of Finance for the work done. All the assets and assessments accumulated and made under the prior statutes were transferred to the Board of Administrators of the city. The prior assessments were confirmed and made exigible at such time and in such manner as the Board of Administrators might designate, and such board was authorized to make an assessment of 2 mills per superficial foot. So that, while the title of the act is to provide for the drainage of New Orleans," and while the city comes into the statute as a party to be ultimately benefited, and whose officers are charged with the administration, yet nowhere in its sections is the burden and duty of the work cast upon the municipality as such. The paramount idea of the statute seems to be not the casting of a duty upon the city, to be discharged in such manner and by such means as it shall select, but rather to transfer from the boards of the original draining districts to certain officers and agents of the city the duty of carrying into effect the drainage system.

And from the foregoing the court declares that neither full power nor general responsibility was cast upon the city in matters of drainage and the collection of the taxes and the

payment of the warrants, but only a limited responsibility for what it (the board) might do or omit to do, as follows:

"We do not mean to be understood as affirming that no duty or liability was cast upon the city by this statute as such, or that the action of the city council thereafter and on April 27 was not within at least the implication of the statute. All we mean to say is, that neither the full power nor the general duty was cast upon the city, and that the designation of its Board of Administrators as the agency to carry on the work of drainage already undertaken by statutory direction by the local boards of separate districts placed upon the city only a limited responsibility for that which such board might do or omit to do."

The duties prescribed by Act No. 16, approved February 24, 1876, are in marked contrast with the above. In that act nothing is required of the "Board of Administrators of the city of New Orleans" and no duties are cast upon said board, but on the contrary, "the paramount idea of that statute is the casting of a duty upon the city to be discharged in such manner and by such means as it shall direct." That act by its title is one—

"To authorize the city of New Orleans" (not its Board of Administrators) "to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferee, and to provide for manner of making said purchase and for paying therefor in drainage warrants."

And by the provisions of said act the Common Council of the city of New Orleans (not its Board of Administrators) was authorized to contract for the rights, franchises and privileges of said canal company and its transferee; and to purchase and transfer to the city of New Orleans—the municipality and not the Board of Administrators thereof—all boats, implements, machinery, etc. The City Council—not the Board of Administrators—was to provide an ordinance for appointment of an appraiser, and all amounts agreed to be paid were to be paid in drainage warrants by the *city of New Orleans* in the manner of those issued under Act 30 of 1871, and thereafter the *city of New Orleans* was to have control of

all rights, powers and franchises under Act No. 30 of 1871, and thereafter said *city of New Orleans* alone should have all power of dredging, ditching, etc.

Acting under the provisions of this act the *city of New Orleans*, by its Common Council, adopted an ordinance appointing its surveyor to make an examination of the property, and report to the Committee of the Whole the condition of the property of said canal company and its transferee, and also upon certain damages claimed by said canal company and its transferee (to be paid for of course out of drainage assessments). Record U. S. C. C. A. 134.

And when said report had been made and the terms agreed upon the council of said city of New Orleans authorized and instructed its mayor to enter into a notarial act of sale for the purchase of the rights and property of said canal company and Van Norden, its transferee (Record U. S. C. C. A., pp. 134 and 135), and in pursuance of said authority said canal company and Van Norden, its transferee, did grant, bargain, sell and convey to said *city of New Orleans* all the rights and property above named, to hold the same unto said *city of New Orleans* forever, for $300,000 of drainage warrants, and $20,000 of the same warrants for said misappropriation of drainage tax collections, and thereupon the mayor bound and obligated, not the Board of Administrators, or any of them, but said *city of New Orleans*, to issue no more drainage warrants other than those issued under said act of June 7, 1876, and (as already stated)—

"Not to obstruct or impede the collection of the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto that the collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses as hereinbefore provided for, under any pretext whatsoever, until the full and final payment of the same." Record U. S. C. C. A., pp. 131, 132.

As to the purchase warrants here in suit, and those issued in compromise of all alleged misappropriations of drainage funds, nothing was required to be done by the Board of Ad-

ministrators of New Orleans, and nothing was done by them, although said Board of Administrators were in existence just the same as they were when said Act 30 of 1891 was passed, and drainage work was done and drainage warrants issued therefor. The last act named provided for action by the *Board of Administrators*, the other for action by the *municipality itself*, and that municipality entered into the act of sale, bought the property, issued and delivered the drainage warrants for the property acquired, made the covenants—expressed and implied—in said act of sale, and in said drainage warrants contained, and then vitiated them, and the responsibility of that municipality for such violation is unlimited, direct and positive.

We therefore submit the second question should be answered in the negative.

Respectfully submitted,

RICHARD DE GRAY,
J. D. ROUSE,
WM. GRANT,
Solicitors for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 282.

JOHN G. WARNER, *Appellant,*

versus

CITY OF NEW ORLEANS, *Appellee.*

Supplemental Brief of Appellant.

RICHARD DE GRAY.
WILLIAM GRANT.
J. D. ROUSE.

L. GRAHAM & SON, LTD., 44-46 BARONNE ST., NEW ORLEANS

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Another authority directly in point on the question of [illegible] plied warranty, discussed in our original brief, (the first [illegible] tion propounded by the Circuit Court of Appeals [illegible] Honorable Court for instructions) is the late case of [illegible] vs. Richards, 163 U. S., p. 385. In that case, as in [illegible] the parties thought they were dealing with matters [illegible] ing a real existence; in that case, that the bonds had [illegible] istence, and in this case that the drainage taxes [illegible] those due by the city of New Orleans—all levied, [illegible] drainage tax rolls duly homologated by the courts, [illegible] existence, and had not been paid, compensated, or [illegible] the issue of the bonds of the "drainage series," [illegible] delivered to take up drainage warrants, the last of [illegible] bonds were issued and delivered more than a year [illegible] months before the sale from Van Norden to the [illegible] place. In fact, the very existence of the taxes at the [illegible] the sale was the consideration for the sale. This [illegible] pears from the certificate of the Court of Appeals [illegible]

wherein the covenant with Van Norden with the city of New Orleans to assist in the collection of said taxes and apply the proceeds of said collection to the payment of the drainage warrants in suit is set forth as follows:

"Not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of drainage tax assessments, as provided by law, until said warrants have been fully paid, it being understood and agreed by and between the parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same."

Surely this covenant to collect and pay the proceeds of the collection is proof positive that it was mutually understood that the drainage tax assessments were in existence and available for the payment of the warrants.

And the fact of the existence of said tax (and that the parties so understood it) further appears from the figures and amounts of said drainage taxes given in said certificate, at the same page, as follows, to wit:

"Up to the date of sale the city had collected on the assessments against private property, $229,922.89, leaving $403,714.47 outstanding and uncollected, of which the city owed $396,394.30 assessed on the streets and squares. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before said sale by the issue of bonds of the "drainage series" to the amount of $1,672,105.21, under authority of Act 73, approved April 26, 1872."

These figures show an issue of bonds more than $200,000 greater than the sum total of drainage taxes outstanding at the time of said sale, and if said bonds were an offset to said taxes there was not a cent to pay for the property purchased by Van Norden. Surely this is a condition of things that was not contemplated by the Legislature when it passed the act of February, 1876, authorizing the city of New Orleans to purchase from Van Norden and pay in warrants drawn against said taxes. Nor could it have been contemplated by Van Norden when he parted with his $300,000 worth of property

for which he could get nothing, nor yet was it contemplated by the city herself—for we can not for a moment suppose that she was undertaking to play a smart trick on Van Norden and get his property for nothing. It being, therefore, clear that both parties to the sale contemplated the existence of the drainage taxes against which the warrants given in purchase of Van Norden's property were drawn and delivered, and that the same were not compensated or offset by said bonds, the law as declared in Meyer vs. Richards is directly applicable and the warranty of the existence of the taxes is complete.

The court, in that case, after stating the law of Louisiana on the question of implied warranty and quoting the Civil Code of that State and citing the cases of Knight vs. Lanfear, 7 Rob. (La.) 172, and Pugh vs. Moore, Hyams & Co., 44 La. An. 209 (which was a suit wherein was sought the recovery of the price paid for the purchase of unconstitutional bonds), said:

"The Supreme Court of Louisiana after elaborate consideration held, among other reasons, that the seller having been obligated to the warranty of the existence of the bonds at the time of the sale, and the bonds being void under the Constitution, he was obliged to return the price."

And the court, after stating that the above law was drawn from the Code Napoleon and from the Roman law, and that under the authorities of this court (which are given) where the provisions of the Louisiana Code and the Code Napoleon are identical, the expositions of the Civil law writers, and the adjudications of the French courts as to the proper construction of the Louisiana Code, were persuasive, quoted from the French commentators as follows, beginning at page 400:

"Marcade, in his commentary on the law of sale, thus states the rule:

"'All sales of a credit subject the seller, unless there be a stipulation to the contrary, to a guarantee of the existence and validity of the credit, as also his right of ownership to it. Article 1693 speaks, it is true, only of the guarantee of the existence of the credit. But as the credit existing to-day, if

subsequently declared to have been void, would in contemplation of the law have never existed, and also as it would be equally immeterial for the buyer if the credit had a real existence, if that existence was available only to some one else, it is evident that by an existing credit is to be understood one which validly exist, as the property of him who transfers it. He who transfers, then, is held to guarantee in three cases: (1) If at the time of the sale the credit did not exist, either because it had never existed or because it was extinguished by *compensation*, by prescription or otherwise. (2) If the credit should be declared to have been void, or the obligation be rescinded. (3) If it belonged to another person than the transferrer" (Marcade, De la Vente, 335.'

"Troplong, in his learned treatise on the same subject, thus expounds the doctrine:

"'In the sale of a credit, as in that of every other object, legal warranty is always understood. The vendor guarantees to the vendee the existence of the credit at the moment of the transfer, although there be no expression in the contract to that effect. It is this which caused Ulpian to say: 'When a credit is sold, Celsus writes in the ninth book of the Digest, that the seller is not obliged to guarantee that the debtor is solvent, but only that he is really a debtor, unless there has been an express agreement between the parties on the subject.' This guarantee is more strictly obligatory in the sale of a credit than in other matters, because the right to a credit is neither visible or palpable as it is in the case of other movable or immovable property. * * * * Therefore let there be no misunderstanding. Do not confound the credit with the title by which it is established. It is law and reason exact that the credit should exist at the time of the sale and it is not sufficient that a title should have been delivered to the buyer. The title is not the credit. It may materially subsist, whilst the credit is extinguished. Thus if the credit had been annihilated by *compensation* or by prescription it would serve no purpose to deliver to the buyer a title which would have nothing but the appearance of life. The buyer in such case would have a right to avail himself of the warranty (2 Troplong, De la Vente, 931, 932).'

"And Laurent, the latest and fullest commentator, says:

"Art. 1693 says, 'that the seller guarantees the existence of the credit.' We must understand this word 'existence' in the sense given to it by tradition. 'Whoever,' says Loyseau, 'sells

a debt or rent, guarantees that it is due and lawfully constituted, because, without distinction in all contracts of sale, the seller is bound to three things by the very nature of the contract: (1) that the thing exists; (2) that it belongs to him; and (3) that it had not been engaged to another.' Pothier resumes this doctrine by saying 'that the guarantee of a debt consists in the undertaking that the right sold is really due by the vendor;' and the Code is yet more brief, since it speaks only of the existence of the debt. We must, therefore, see what the existence of the debt signifies, according to the explanation of Loyseau. Firstly, the vendor is held to guarantee that the debt exists and subsists (*'soit et subsiste'*); if the debt has never existed because one of the conditions necessary for the existence of the contract makes default, the vendor has sold nothing; there is no object; he is held to guarantee; this is obvious. The same rule would apply if the debt had existed, but was *extinguished* at the time of the transfer, because it is as if it had never existed. Such would be the case of a credit which was prescribed, or which had been extinguished by *compensation*. * * * It is necessary, in the second place, that the credit should be as constituted, says Loyseau: If it is stricken with a vice which renders it void, the vendee has a right to the warranty. This is not doubtful, since the right is really annulled or rescinded because the judgment annulled the credit destroys it as if it had never existed' (Laurent, Vol. 24, Nos. 540, 541, 542).

And the court then said:

"The views thus expressed by the foregoing writers are substantially concurred in by the French commentators. Duranton, Vol. 9, p. 183; Aubrey & Rau, Vol. 5, p. [illegible]. The courts of France from an early day have applied the same principle."

The court then gives two French decisions (which fit and meet the defence here contended for) as follows:

"In Prat c. Dervieux the facts were these: Dervieux transferred the amount of a claim against the government which by a subsequent liquidation of accounts was compensated by a claim held by the government which resulted in another matter. The Court of Cassation held that under Art. 1693 of C. N., the obligation to guarantee the existence of the claim at the time of the sale compelled the vendor to restore the price. Journal du Palais p. 311."

"In Revel C. Lippman a transfer was made of a claim against the government, which was stated to be subject to a future settlement of accounts. On the ultimate liquidation it was found that nothing was due, and the Court of Cassation held that the obligation, therefore, arose to return the price paid on the sale. Journal du Palais, 1825, p. 963."

Surely under the Code of Louisiana, the decisions of the courts of that State, the decision of this Honorable Court in Meyer vs. Richards, and under the French authorities at length cited in the latter case, there can be no doubt of the warranty of the existence of the drainage taxes (that the same had not been and were not liable to be offset by the issue of bonds of the drainage series), at the time of the sale by Van Norden to the city of New Orleans.

Again:

The act of the Legislature authorizing the purchase of the drainage machinery was passed while the drainage work, for which drainage taxes had been assessed, was in the process of completion. It was contemplated that the city of New Orleans should take the place of the Mississippi and Mexican Gulf Ship Canal Company and Warner Van Norden, its transferee, and complete this great public improvement, and in that way to make the drainage taxes available for the payment of the property purchased. While it may be conceded that the sale was made upon the condition that the price of the property purchased should be paid out of the drainage taxes then assessed and extant on the tax rolls, it can not be presumed that it was contemplated by either party to the contract, that it was left optional with the city to render the taxes unavailable for that purpose by refusing or neglecting to complete the work, and thus, by her own act, avoid the payment of the price. Although not expressed in terms, there was necessarily an implied stipulation on the part of the city that she would on her part do whatever was necessary to earn the drainage taxes, and create the fund out of which the price was to be paid. This we conceive to be a general rule of construction. This rule has been adopted as a principle by the Civil Code of Louisiana (Art. 1964), which reads as follows:

"Equity, usage and law supply such incidents only as the "parties may reasonably be supposed to have been silent "upon from a knowledge that they would be supplied from "that source."

Says Art. 1965: "The equity intended by this rule is "founded in the Christian principle not to do unto others "that which we would not wish others to do unto us; and "on the maxim of the law that no one ought to enrich him-"self at the expense of another."

Inasmuch as the city received from Van Norden property worth $300,000, as valued by herself, and agreed to pay for it out of drainage taxes, which it was within her power to earn by completing the work necessary to make such taxes available as a fund for that purpose, the law, as well as common honesty, requires the courts to create, by implication, an agreement to complete the work for the vendor's benefit. Indeed, the contract of sale indicates that such was the actual understanding of both parties, for the city stipulates "not to "obstruct or impede, but, on the contrary, to facilitate by all "lawful means the collection of the drainage assessments as "provided by law until said warrants are fully paid."

If this is not an express covenant to carry on the drainage work and earn and collect the taxes, it certainly will support such a covenant by implication.

Having purchased upon the condition that the price should be paid out of drainage taxes, and the city having it within her power to fulfil that condition by earning the taxes and making them available for the payment of the warrants, we submit that her refusal to exercise that power must be considered as equivalent to its accomplishment. This principle is embodied in the Civil Code of Louisiana, Art. 2048, as follows:

"The condition is considered as accomplished when the "fulfilment of it has been prevented by the party bound to "perform it."

"It is," says Pothier on Obligations, Vol. 1, p. 121, "a rule "common to all conditions of obligations that they be taken "as accomplished when the debtor who is obliged under such "conditions has prevented their accomplishment."

So if a plaintiff who agrees to pay a certain fee to his attorney for prosecuting a suit, in case he recovers judgment, compromises the suit before trial of the case, his obligation becomes absolute.

Rightor vs. Aleman, 4 Robinson (La.) 45.

In this respect the rules of the common law are the same. Thus in Hotban vs. East India Co., 1 T. R. 638, which was a suit on a charter party containing a clause that nothing should be allowed the ship for short tonnage, unless the same should be certified by the company's agent at Calcutta, the agent, though requested by the master of the ship, refused to grant a certificate, although the tonnage was short; but the court held that the wrongful refusal of the agent should be considered equal to the performance of the condition upon which payment was made to depend.

Municipal corporations may, no doubt, abandon and discontinue works of improvement already undertaken on grounds of public policy, and the courts will not generally assert their jurisdiction to compel them to either undertake or continue them, at the suit of a person who has a contract to make them. But it does not follow that they may on this ground refuse to pay a contractor for material furnished for the purpose before the work is begun, or for expenditures made after it is undertaken. If the contract is made upon the condition that the contractor is to be paid out of special taxes to be levied, it must necessarily be held that abandonment of the work and the refusal to earn and collect the taxes has the effect of accomplishing the conditions, so that the corporation will be considered as having in its possession the fund out of which the contract was to be paid. The law thus works out a liability against the corporation and in favor of the contractor, which is equivalent to an express promise to pay for the work done to the extent of the taxes that ought to have been assessed and collected.

This principle has been fully recognized by the Supreme Court of the United States, as well as that of the State of Louisiana. The late case of the District of Columbia vs. Lyon, 161 U. S. 200, seems exactly in point. The city and

District of Columbia issued and sold certificates to raise funds to defray the cost of paving, which were payable out of special taxes to be assessed upon the property bordering on the line of the improvement. The work was done by the contractor, but the taxes could not be collected on account of a failure to make lawful assessments. To a suit on the certificates the District of Columbia pleaded that it was not liable, contending that the contractor had agreed to look solely to the special taxes for payment. This court, in affirming the decree of the Supreme Court of the district, maintaining the validity of the certificates, held that the effect of the law "was "not to charge the municipality, with a direct indebtedness, "for the work done under its ordinances, but with a duty to "work out a payment thereof by seeing to it that the cost "should be charged as a lien upon adjoining lots, and by en- "forcing the lien and collecting the special tax from the lot "owners;" and that a failure to perform this duty made the district liable for the amount of the certificates.

The principle established by this case has been materially extended by the Supreme Court of Louisiana.

In the case of Cole vs. Shreveport, 41 La. An. 841, it appears that the plaintiff contracted with the city of Shreveport to do certain paving, the cost of which, by an act of the Legislature under which the work was supposed to be authorized, was to be borne, two-thirds by the owners of the property fronting the street to be improved, and one-third by the city. By a stipulation in the contract the plaintiff was to receive in payment of the city's share certain wharfage dues. After the work was done, the courts decided that the property holders were not liable, and that the collection of wharfage dues was unlawful. These sources of payment having failed, suit was brought against the city for the price of the work. Upon appeal from a judgment in favor of the plaintiff it was contended that having contracted to accept the wharf dues in satisfaction of his work, the plaintiff must be satisfied with the "pound of flesh," and had no recourse against the city upon the failure of the tax, but the court refused to adopt this view of the rights of the contractor, remarking in the course of its opinion that "jurisprudence has

" settled that notwithstanding a stipulation specially ex-
" cluding any recourse on the city, a contractor who has done
" (made) useful improvements, and whose payment fails by
" reason of subsequent events, which have diverted the reve-
" nues applicable to his claim, can recover against the city
" with which he has contracted." And the court cited Hitch-cock vs. Galveston, 96 U. S. 341, as affirming this principle.

The early case of Semel vs. Gould, 12 La. An. 225, was also referred to as establishing the same doctrine. In this last case it appears that the police jury of the parish of Point Coupee, contracted with the plaintiff for the building of a levee upon certain specific lands, it being specially stipulated that the contractor should look for payment exclusively to the lien given by law on the land for the cost of the work.

But when the contractor attempted to enforce the lien for the amount due him, it appeared that the land belonged to the United States and was not liable. The contractor thereupon sued the police jury and recovered judgment, in affirming which the Supreme Court said that " in making the con-
" tract for building the levee there was an implied warranty
" on the part of the police jury that the land on which the
" work was to be done belonged to a person whose property
" could be reached by their ordinances to defray the expenses
" of such work." See also the following cases to the same effect:

Morgan vs. Police Jury, 11 La. 163.

Newcomb vs. Police Jury, 4 R. (La.) 233.

Cronan vs. Municipality No. One, 5 La. An. 537.

By the contract of purchase the city agreed to pay the warrants out of a fund to which she was herself largely indebted, and upon that promise Van Norden parted with his property. The doctrine of equitable offset can never apply to such a transaction. If she had any claim against the fund which would diminish or extinguish it, and which she intended set up against it, it was incumbent upon her, in common honesty to have made such fact and intention known to Van Norden at the time of the purchase.

King vs. Flower, 16 Mass. 394.

Mauber vs. Massias, 2 W. Blackston, 1072.

Zacharie & Co. vs. Rogers & Harrison, 19 La. R. 218.

U. S. vs. Bank of the Metropolis, 15 Peters, 377.

In this latter case the postmaster general accepted a draft of a mail contractor, payable to the defendant out of money due the contractor, but when the acceptance was pleaded as an offset against the United States it was alleged that the contractor was indebted to the government in a greater sum for forfeitures, at date of acceptance, but the court held that not having disclosed this fact at the date of acceptance, the United States was estopped from pleading the offset.

And so, in general, the conduct of a party may be such as to deprive him of the benefit of claiming an offset.

Kent vs. McPherson, 7 Harr. & M. 320.

And the reason is thus stated by the court in Dickerson vs. Colgove, 100 U. S., p. 580:

"The law on this subject is well settled. The vital principle is, that he who by his language or conduct induces another to do what he would not otherwise have done, shall not, subject such person to loss or injury by disappointing the expectations upon which he acted. Such change of position is strictly forbidden. It involves fraud and falsehood and the law forbids both."

Having transferred a part of the drainage fund to Van Norden, the city, as we have seen, warranted that such a fund existed. But she did more. She estopped herself from competing with her assignee for any part of the fund in the same manner as one who sells a part of several mortgage notes is estopped from competing with his vendee for the proceeds of the mortgaged property if they are insufficient to pay all the notes. See Sulzman vs. His Creditors, 2 Rob. 241, where the court at page 343 said:

"When the holder of the secured mortgage assigns a part of it he can not be permitted to come in competition with his assignee if the pledge is insufficient to pay both; although he warrants only the existence of the debt at the time of the transfer, yet it would be contrary to good faith that the vendor of a claim after receiving the price of it from the assignee should, by his own act, prevent the latter from receiving the sum he has paid."

And this decision has been followed in the following cases: Barksdale vs. Herwig, 30 An. 618; Reine vs. Jack, 31 An. 359; Abney & Co. vs. Walmsley, 33 An. 591.

The decisions of the courts of Louisiana are in harmony with the universal rule that the right to plead compensation or set-off rests on the basis of good faith. It is not admitted where its operation would involve a deception and a fraud upon him against whom it is pleaded.

Nolan vs. Shaw, 6 An. (La.), 40.

McKee vs. Amouette, 6 An. (La.), 207.

Where money is received as a deposit, subject to the creditor's order, compensation does not take place. It is an equitable remedy, and it is not admitted when against good conscience.

Breed vs. Purvis, 7 An. (La.), 53-673.

It was urged, in argument in the court below, that the constitutional amendment of January, 1875, limiting the debt of the city, operates as a bar to recovery on these warrants, save to the extent of taxes actually realized by her. The amendment is as follows:

"The city of New Orleans shall not, *hereafter*, increase her "debt in any manner or form, or under any pretext. After "the 1st of January, 1875, no evidence of indebtedness or "warrant for the payment of money shall be issued by any "officer of said city except against cash actually in the treas-"ury; but this shall not be so construed as to present a "renewal of matured bonds at par, or the issue of new bonds "in exchange for other bonds, *provided* the city debt be not "thereby increased, nor to prevent the issue of drainage war-"rants to the transferee of contract under No. 30 of 1871, "payable only from drainage taxes, and not otherwise."

As the amendment by its terms was a prohibition only against a future increase of the debt of the city, it could not affect any prior transaction. Indeed, for the purpose of expressly excluding its application to drainage matters the proviso was inserted declaring that it should not prevent the issue of drainage warrants under the Act of 1871. This left the city charged with the same responsibility with regard to

the drainage fund as if the constitutional limitation had not been adopted, and this responsibility included an obligation on her part to pay into that fund the amount of her own indebtedness to it of more than $600,000, as assessee of the public streets, squares and landings. Authority to issue warrants against this fund implied a duty on the part of the city to apply the drainage fund, including that part of it which she herself owed, to their payment, for the power to create a debt carries with it the authority and the duty to provide a source of payment.

The case is within the principle laid down in Loan Association vs. Topeka, 20 Wallace, 655:

"That when a Legislature of a State authorizes a county or "city to contract a debt by bond it authorizes it (by implica- "tion) to levy such taxes as are necessary to pay the debt."

We submit, therefore, that the amendment was in effect an affirmance of the liability of the city, as it existed prior to January 1, 1875, in all matters pertaining to the drainage fund, and that it affords no defence to the enforcement of a contribution on her part of a sufficient portion of the drainage taxes due by her to pay the Van Norden warrants.

It is therefore clear that the city of New Orleans has not and can not be discharged from liability toward the drainage fund by the issue and delivery of the said bonds, and that she must account for the drainage taxes due and extant at the time of said sale, and that she herself, as assessee of the streets and squares, is indebted to that fund for the sum of $696,394.30, which is available for the payment of the warrants given for the property purchased from Van Norden.

We, therefore, again say the first question propounded by the Court of Appeals should be answered in the affirmative, and that the second question propounded should, for the reasons given in our former briefs, be answered in the negative.

Respectfully submitted,

RICHARD DE GRAY.
WILLIAM GRANT.
J. D. ROUSE.

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167-467

SUPREME COURT OF THE UNITED STATES.

No. 664. 282.

JOHN G. WARNER, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

BRANCH K. MILLER,
Solicitor for Defendant in Error.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

IN THE

Supreme Court of the United States.

No. 282.

JOHN G. WARNER, PLAINTIFF IN ERROR,

vs.

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

SYLLABUS OF POINTS AND AUTHORITIES FOR DEFENDANT IN ERROR.

It is never too late to consider the question of jurisdiction in the courts of the United States, and if at any time the want of jurisdiction should appear, it is the duty of the court to dismiss the case. (Act of Congress March 3, 1875, section 5 (18th Stat. at Large, 472); Simon *vs.* House, 46 Fed. Rep., 419; Hartog *vs.* Memory, 116 U. S., 588; Morris *vs.* Gilmer, 129 U. S., 327; Anderson *vs.* Watt, 138 U. S., 701; Colvin *vs.* Jacksonville, 158 U. S., 459, 460.)

Such question may be made after decree below and writ of error and for the first time in the Supreme Court. Whether the circuit court had or had not jurisdiction is a question which this Court must examine and determine, although the parties forbear to make it, or consent that the case be considered on its merits. (Charleston Bridge Co. *vs.* Sweeney, 55 Fed. Rep., 541; King Bridge Co. *vs.* Otoe County, 120 U. S., 226; Metcalf *vs.* Watertown, 128 U. S., 587; Parker *vs.* Ormsby, 141 U. S., 85, 86; Mexican, etc., R'w'y *vs.* Davidson, 157 U. S., 208.

The circuit court has no jurisdiction of a suit brought by the assignee of a "chose in action," unless the assignor could have sued in that court had no assignment been made. (Act of Congress March 3, 1875 (18th Stat. at Large, 470); as amended by act of March 3, 1887 (24th Stat. at Large, 552), and re-enacted to correct enrollment August 13, 1888 (25th U. S. Stat. at Large, 433, 434); Corbin *vs.* County of Black Hawk, 105 U. S., 665; King Bridge Company *vs.* Otoe County, 120 U. S., 225; Shoecraft *vs.* Bloxham, 124 U. S., 731; Brock *vs.* North-western Fuel Company, 130 U. S. 341.)

The act of 1888 has been construed as denying jurisdiction over suits for the recovery of contents of promissory notes or other "choses in action" brought in favor of assignees or transferees, excepting over, *first*, suits upon foreign bills of exchange; *second*, suits that might have been prosecuted in such court to recover such contracts if no assignment or transfer had been made; *third*, suits upon "choses in action" payable to bearer and made by a corporation. The present case is included in neither one of these three

classes. It is obviously not embraced in the first two; it is removed from the third in that, although the obligation sued upon is that of a corporation, it is not payable to bearer, but to a certain payee or his order. (Neugas *vs.* City of New Orleans, 33 Fed. Rep., 198; Rollins *vs.* Chaffee County, 34 Fed. Rep., 91, 92; Wilson *vs.* Knox County, 43 Fed. Rep., 481, 482, decided by the late Justice Miller, sitting on circuit; Bank of British North America *vs.* Barling, 46 Fed. Rep., 357; Nelson *vs.* Eaton, 66 Fed. Rep., 377, 378; Plant Investment Co. *vs.* Key West Company, 152 U. S., 71; New Orleans *vs.* Benjamin, 153 U. S., 433; Hudson *vs.* Bishop, 38 Fed. Rep., 680.)

A suit to compel the specific performance of a contract or enforce its other stipulations is a suit to recover the contents of a "chose in action." (105 U. S., 665; Plant Co. *vs.* Key West Co., 152 U. S., 71; New Orleans *vs.* Benjamin, 153 U. S., 433; Mexican National Railroad *vs.* Davidson, 157 U. S., 206.)

To constitute an equitable estoppel there must be error by the party pleading it induced by false representation or concealment of material facts by the party against whom it is pleaded, made with knowledge of the truth, to a person ignorant of the same. There must be, further, action by the deceived party, induced by the representation or concealment of the other. (Bigelow on Estoppel, p. 570 *et seq.*)

In the present case there was a full knowledge on the part of Van Norden of the kind and value of consideration he was receiving from the city, which acted under a statute. He was to be paid in warrants of the kind he had been receiving for years already. He knew that they were payable

out of a fund contingent as to its existence and uncertain as to its amount. He was fully informed as to the condition of the drainage fund and the statute and contract under which it was created. He knew its resources, the amount collected and paid over, and what remained outstanding. He accepted the warrants as payments with full knowledge of their character.

It was held in Peake *vs.* New Orleans, 139 U. S., 359, that when the city retired $1,600,000 of drainage warrants by its bonds for an equal amount it had contributed that much to the drainage fund, to which at the time it was a debtor of $1,400,000; in other words, that it had paid into the fund $200,000 more than it owed. Hence the city has already overpaid the largest amount at which plaintiff's claims could be put. It is in reality a creditor of the drainage fund.

Under the Louisiana Code, in the sale, exchange, or other transfer of a promise to pay money, the warrant of the transferrer extends only to the existence of the obligation transferred. Under such a warrant the transferrer does not guarantee the solvency of the debtor or that the obligation will be paid or satisfied. The warrants sued upon in the present case are "incorporeal rights," under the terminology of the Civil Code of Louisiana. In a conveyance of such property the grantor warrants only its existence. He does not guarantee the solvency of the debtor unless he has so expressly bound himself. No such warranty can be implied. (Civil Code of Louisiana, articles 2646 and 2647; Banner *vs.* Van Norden, 27th La. An., 480; Johnson *vs.* Boice & Frellsen, 40th La. An., 274–'5.)

There was in this case, however, no assignment or transfer of any debt. The warrants purported no indebtedness, but were claims against a particular fund. They were not payable generally, and, at all events, but only out of certain designated taxes. (See sec. 3, act No. 16 of 1876.)

In Louisiana there is no warranty of any kind in a contract of sale where the buyer is aware of the danger from which he afterwards suffers, in which case he is considered as buying at his own risk and peril. (Civil Code of Louisiana, article 2205; N. O. & Carrollton R. R. *vs.* Jourdain's Heirs, 34th La. An., 650.)

Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN G. WARNER

against

THE CITY OF NEW ORLEANS.

No. 631.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FROM THE FIFTH CIRCUIT.

Brief for Defendant in Error.

The instructions sought by the Court of Appeals cover two points; they are to be found on page 5 of the transcript of the record, and are stated as follows:

First.—Is the City of New Orleans, under the warranties, expressed and implied, contained in the contract of sale of June 7th, 1876, by which she acquired the property and franchises from Warner Van Norden, and under the averments of the bill estopped from pleading against the complainant, the issue of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds, collected on private property, and as a discharge from her own liability to that fund, as assessee of the streets and squares?

Second.—Should the decision in the case of *James W. Peake* vs. *The City of New Orleans*, 139 *U. S.*, page 342, be held to apply to the facts of this case, and operate to defeat complainant's action.

The several questions, covered by the instructions requested, are fully disposed of by the decision of this Court, in the case of *Peake* vs. *The City of New Orleans*, 139 *U. S.*, 342. The character of the obligation sued upon here is identical with the drainage warrant, which was the cause of action in the Peake case. There is in principle no difference between the two. They are exactly alike in every particular, save in the immaterial respect that the warrants sued upon in the Peake case, were given for drainage work, done between 1871 and 1876; they were issued for labor and materials employed in the construction of drainage canals and levees. The warrant relied upon in the present case, is one of the series issued to Warner Van Norden, by the City of New Orleans, in payment of the purchase price, of the drainage plant and franchises, which the City was authorized to buy by Act of the General Assembly No. 16 of 1876. Any distinction sought to be made between the "work" warrants, and the "purchase" warrants, is based upon a difference only seeming and exists only in words.

Before, however, proceeding to any discussion of the questions immediately presented by the record, the Court will be asked to examine a question of jurisdiction which appears upon the face of the papers.

Such question may be raised at any time, and it is not only the right, but the duty of the Court, to consider such matter, in whatever mode it may be brought to its notice.

Act of Congress, March 3d, 1875, *Sec.* 5.
18*th Statutes at Large*, 472.
Simon vs. *House*, 46 *Fed. Rep.*, 319.
Morris vs. *Gilmer*, 129 *U. S.*, 327.
Harlog vs. *Memory*, 116 *U. S.*, 588.

Such question may be raised for the first time, even after a decree below, and a writ of error in this Court.

Capron vs. *Van Norden*, 2 *Cranch*, 126.
King Bdge. Co. vs. *Otoe Co.*, 120 *U. S.*, 226.
Charleston Bdge. Co. vs. *Sweeney*, 55 *Fed. Rep.*, 541.

Complainant sues as the assignee of a drainage warrant, a "chose in action," acquired by assignment from Warner Van Norden, who in turn holds the same, as assignee of the original holder thereof, namely, the Mississippi and Mexican Ship Canal Company, which was a corporation, created by the laws of the State of Louisiana, domiciled and carrying on bnsiness therein. The warrant held by complainant is his, only by reason of its transfer from Van Norden, who acquired it as assignee and transferee of the Canal Company's contract with the City of New Orleans, found in Act No. 30 of 1871.

The condition of the record upon this point, will leave this Court in no doubt, that there was a want of jurisdiction in the Circuit Court.

The plaintiff sues as the transferee of Van Norden, the transferee, pledgee, and assignee, of the Mexican Gulf Ship Canal Company, to enforce the payment of a drainage warrant, issued to Van Norden, as such transferee, assignee and pledgee. Provision for the payment of the warrant, is found in section 9, of the Act No. 30 of 1871, which establishes a fund for the payment of warrants issued to the Company, in payment for work described in the Act. The statute creates a contract, or chose in action, in favor of the Company, which was domiciled in New Orleans, as is stated in the first section of the Act of 1871.

The warrant sued upon is payable to Van Norden, as transferee, of the Mississippi and Mexican Gulf Ship Canal Company. It is payable out of any funds in the City treasury to the credit of said Company. It recites on its face, that it is issued in accordance with the provisions of Act No. 30 of 1871, and the Administrator of Finance is directed to pay it in cash if there be any funds in the City treasury, to the credit of the Company; and if

there be not sufficient funds to cash the warrant, then the Administrator of Finance is required to enter upon the same the date of its presentation, the warrant to bear interest at eight per cent. per annum, from and after the date of such presentation and endorsement, until paid. The warrant contains at the bottom the further endorsement, "Charge Mississippi and Mexican Gulf Ship Canal Company," signed by the Administrator of Accounts and the Administrator of Finance.

The warrant shows in its very aspect that Van Norden, the assignor of plaintiff, received it as the assignee of the Canal Company. He received it in virtue of no right originally his own, but altogether derivative, acquired by transfer, or assignment from the Canal Company. The warrant in terms is to be paid out of moneys to the credit of the Company, and by the endorsement at the foot it was charged against the Company. Express reference is made to Act No 30 of 1871, the contract between the Canal Company and the City, as the source from which the right to payment is derived. Act No. 16 of 1876, which is the authority of the City, simply to contract, empowered the latter to purchase, from the Mississippi and Mexican Gulf Ship Canal Company, and the transferee thereof. (See section 1st.) It authorizes the purchase bythe City of all or any rights, franchises and privileges, created, authorized or arising in favor of the Company, or its transferee, under and by virtue of Act No. 30 of 1871, which is an Act exclusively in favor of the Canal Company, described in the first section as a corporation of this State, domiciled in the City of New Orleans. The contract between Van Norden and the Canal Company, of date Nov. 23d, 1872, shows exactly the character in which Van Norden appears, it being a transfer or assignment, by the Company to Van Norden, of all rights accruing to the Company under its contract of 1871; the Company is described in the Act as a corporate body of the State of Louisiana, domiciled in the City of New Orleans. In the conveyance of the Canal Company, and Van Norden as its transferee, to the City on June 7th, 1876, upon which complainant relies, Van Norden is

styled not only transferee, but also *pledgee* of the Company, and transfers to the City all rights, title, interest, claims and demands, franchises, privileges and contracts and advantages of every nature whatsoever, which the Company had or might have had, under and by virtue of the Act No. 30 of 1871, and of all other Acts of the Legislature, and which Van Norden, as transferee and pledgee, *had or might have had under and by virtue of the Act passed on the 22d of May, 1872, before A. Hero, N. P.*, which Act is an act of pledge.

It would thus appear that in order to hold the City, as attempted by the bill herein, there must be enforced against it a liability arising from the original contract with the Canal Company. It was from the Company that Van Norden obtained whatever rights he may have, as transferee, assignee or pledgee, and it is from Van Norden that the complainant, Warner, derived whatever rights he may have; thus tracing back to the original contract, between the City and the Company, as the source of the pretensions of the complainant, put forward in this suit; were it not for the assignment of the Company to Van Norden, the complainant would have no standing. It is only on account of a cause of action, growing out of dealings of the Company with the City, that any relief can be obtained here. The mode of paying the warrants is provided by the Act of 1871, in favor of the Company, and this right, whatever it may be, would exist to-day in favor of the Company, were it not for the assignment to Van Norden.

Act No. 16 of 1876, by authority of which, the purchase by the City of New Orleans of the tools, implements and rights of the Company is authorized, provides that the purchase price shall be paid in drainage warrants, (section 3d,) which warrants shall be issued in the same form and amount, as those theretofore issued to Van Norden, the transferee of the Company, under Act No. 30 of 1871. They are made payable out of the drainage assessments provided for by the Act of 1871, and the antecedent legislation. While it is true that the warrants were issued direct to Van Norden, they were so issued, and made pay-

able to him, in his character of transferee of the Company. His title as transferee is based upon the assignment of the Company to him in 1872, and except for said assignment he would have no title to the warrants. He is dealt with, in the transfer to the City, as standing in the shoes of the Company, his assignee, which joins with him in the conveyance to the City, of all the rights derived by the Company, from the Act and contract of 1871. The status of Van Norden, as a transferee and assignee, is preserved throughout all the dealings between himself and the City. He is on no occasion treated with, as a person contracting in his own original right, but as one claiming to act under a title derived from the Company.

The warrant in the hands of Van Norden, if he were not transferee, would be worthless, since in such condition, there is no means provided for its payment. It cannot be enforced, except by exercise of the rights conferred upon the Company by the Act of 1871, and the contract resulting therefrom; the Act providing (section 9,) that all moneys received by the City, under the Act, shall be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be held in trust, for payment to the Company, should the same be required, for the works of drainage. This vests all the right to drainage taxes in the Company, which being incompetent to sue in the Circuit Court by reason of its being a citizen of the State of Louisiana, Van Norden, as assignee, and complainant, his assignee, is likewise Incompetent.

The warrant itself is a mere piece of paper, without value, except for the provision for its payment made by the Act of 1871. That the right of payment given the Company by the Act of 1871, is a "chose in action," is unquestionable.

Corbin vs. *County of Blackhawk*, 105*th U. S.*, p. 665.
Brock vs. *Northwestern Fuel Co.*, 130*th U. S.*, p. 341.
Shoecraft vs. *Blossom*, 124*th U. S.*, p. 731.
King Bridge Co. vs. *Otoe County*, 120*th U. S.*, p. 225.

The Act of 1871 is the contract of the Mississippi and Mexican Gulf Ship Canal Company with the City. It is by that Act and contract that the drainage taxes are levied, and through which alone, the complainant can obtain payment. The fact that he holds drainage warrants under the act of purchase, is *not* his title to relief, but merely the means by which he invokes the Act of 1871. If he sued on warrants alone, he could not obtain the relief he seeks. He must avail of the act to establish the City's liability. He in reality sues to enforce that contract, or to recover for its breach, as succeeding by assignment from Van Norden, to his rights as assignee.

A "chose in action," is an action to recover on a contract. When a contract for the payment of money is sought to be enforced or availed of by suit, the complainant sues on a chose in action. Whenever the chose in action has been assigned, the jurisdictional rule applies, that the suit cannot be maintained unless the original party, *i. e.*, the assignor, could have sued. Viewed as a suit to enforce the drainage contract of 1871, the jurisdiction fails. Besides, the warrants themselves exclude the jurisdiction. The bill is filed to enforce the payment of the purchase warrants, and warrants issued for work as well, as to the first class, on their face, they are payable to Van Norden, as transferee. They plainly express it, as the right of the Canal Company, of which he is assignee. As to the other class, *i. e.*, work warrants, they are payable to the Mississippi and Mexican Co.

See the section of Act of 1871 as to warrants.

The law is that no suit can be brought on *a chose in action*, *i. e.*, a warrant issued by a municipal corporation, unless the original party could have sued, (*i. e.*, the Mississippi and Mexican Gulf Ship Canal Company.)

See the *Act of Congress of August*, 1888, *25th Statute*, page 454, section 1.
93d U. S., page 206.
9th Wall., page 387.

33d Federal Rep., page 197.
8th Howard, page 449.
52d Federal Rep., page 177.
16th Howard, page 622.

Passing, however, to the issues presented by the questions transmitted by the Court of Appeals, the first is fully answered by the averments of the bill itself. It is contended by appellant that the City is estopped, to claim that its issue of $1,672,105.21 of bonds, which went into the drainage fund, is a discharge of her obligation to account for assessments collected on private property, and is also a discharge from her own liability to that fund as assessee of the streets and squares. It is a proposition requiring no argument, that an estoppel always assumes error, which has been induced by the party against whom the estoppel is pleaded. To constitute an equitable estoppel there must have been a false representation or concealment of a material fact, made with a knowledge of the fact, to a party ignorant of the same. There must also be an intention to induce action by the party to whom the representation was made, and the latter must act upon the representation or concealment. All these conditions must be present in order to make out an estoppel.

Bigelow on Estoppel, p. 570, *et seq.*

There cannot be found in the transaction between Van Norden and the City a single element of an estoppel; no representations were made to him; no concealment. He was, perhaps, better informed than the City as to the probability of the warrants being paid. There was no design to be gathered from the circumstances, to justify the proposition that the City intended that he should be harmed, still less is there the faintest appearance, that he consented to the sale by reason of any representation made to him by any one. There must also be either fraud, or perhaps negligence, as is claimed by appellant, but in what respect was Van Norden misled, deceived, or in any manner imposed upon, by his accept-

ance of a price payable exclusively in drainage warrants, for his sale to the City in 1876? Van Norden himself, as assignee of the Mississippi and Mexican Ship Canal Company, had been the drainage contractor from May 22, 1872, to June 7, 1876. The bonds were issued in 1873, under the authority of an Act of the General Assembly adopted in 1872. The transaction by which the City, by its bond issue, made a contribution to an equal amount to the drainage fund, occurred while Van Norden himself was a participant in that fund, in which character he, presumably, at least, received an amount of bonds, corresponding to the work performed by him between 1872 and 1876; as contractor he was payable from such fund, and looked to it for the satisfaction of the warrants, given to him by the City for work. Under the contract he must be held to have been fully informed as to the resources and general condition of the fund, when he agreed to receive as the price of his sale, obligations exigible from the same source, from which he had been receiving payment, on other accounts, for about four years. He could in no sense have been deceived or misled; he was the transferee of the Canal Company; his knowledge of his own property, would necessarily include every fact concerning the drainage fund, from its inception; as a purchaser from the Canal Company, he is considered to have known the exact nature of the contract he bought; the kind and condition of the resources from which his compensation was to come; how much the assessments aggregated; what had been collected and paid over, and what amount remained outstanding; selling to the City in 1876, after an actual experience of some years, the drainage warrants constituting his price described in his act of sale, as being the same as those issued under the Act of 1871, he knew exactly what was offered as the price, and with such knowledge accepted what was tendered in payment.

But this contention of the plaintiff, is not now an original question, as it was specially raised and passed upon by this Court, in the Peake case, where it was held that the bond issue was a contribution to the fund itself,

far in excess of any amount that might have been due by the City as a debtor. The amount of drainage assessments outstanding and uncollected, at the time the City executed and delivered its bonds, was about say, $1,400,000. The bond issue contributed to the fund something over $1,600,000, or an amount of about $200,000 in excess, of what the whole fund would have reached, had it been collected in its entirety, and reduced to possession by the City. The considerations of equity which underlie the doctrine of estoppel, would find a strange application in this case, if, as is insisted by appellant, the City is to be treated as though the drainage fund had never been enriched at its expense. It has not only discharged all conceivable obligations to the fund, but in reality it has made the latter its debtor.

This contention, as has been said, was made in the Peake case, and thus disposed of by this Court, page 359:

"It is admitted that the City has issued sixteen hun-
"dred thousand dollars of its own bonds, taking up
"thereby a proportionate amount of the drainage war-
"rants. It is not questioned by complainant, that if this
"issue of bonds is to be taken as a payment of its indebt-
"edness to the drainage fund, its obligations to that fund
"have been fully discharged, and, in addition, that the
"amount of such contribution in excess of its obligations
"to that fund, more than covers all alleged misappropri-
"ation thereof. In other words, the sixteen hundred thou-
"sand dollars, exceeds both the obligations of the City to
"the fund, and its alleged misappropriation of any part
"thereof. But the contention of the complainant is, that
"there is nothing in the legislation, the ordinance, the
"warrants, the bonds, or other proceedings, which ex-
"presses an intent to make this contribution one in dis-
"charge of such indebtedness; and that, if it simply gave
"these bonds to the fund, if other and ultimate corporate
"benefit was the consideration of their issue, it cannot be
"affirmed that they were intended, or ought to be taken,
"as payment of the original obligation created by the

" assessment proceedings. The answer to this view is clear
" and just. It is true that ordinance No. 814, which pro-
" vides for the refunding of warrants into City bonds, con-
" tains no declaration that such refunding shall be in
" discharge of the City's obligation as assessee, to the
" drainage fund; and that the assessment proceedings
" contain no receipt or release of the City as assessee by
" reason of its issue of bonds. On the face of the record
" there is no discharge of the City's obligation as assessee;
" and if we rest upon the letter, it perhaps could not be
" denied, that the City is still a debtor to that fund; but
" equity looks beyond the form to the substance of things,
" and these are substantial facts: For thirteen years a
" drainage system had been in force, in respect to which
" the City had no duty and no obligation, other than as
" supposed owner and assessee of certain public grounds.
" The assessment proceedings had proceeded so far, that
" there was a large apparent obligation of the City to the
" drainage fund. In 1871 an Act of the Legislature is
" passed, empowering the Canal Company to complete the
" work, transferring to a subordinate administrative body
" of the City all assessments theretofore made, and im-
" posing upon it the further duty of assessment and col-
" lection. No provision is made by the legislative act for
" payment for the work done or to be done, otherwise than
" through the collection of these local assessments. In
" that emergency the City, by ordinance, says to the con-
" tractor named by the State, go on with the work, and if
" the warrants issued in payment therefor be not satisfied
" out of the assessment collections at the end of the year,
" they may be exchanged for City bonds. The work pro-
" gresses, and warrants are issued and exchanged for City
" bonds, which have passed into the markets of the world,
" and remain the undisputed obligations of the City, and
" to an amount far in excess of all the assessments charged
" against the City. In other words, the City, as assessee,
" owing the drainage fund a certain debt, puts into that
" fund twice the amount of the debt. Can any creditor of
" that fund thereafter equitably charge the City as debtor

"to that fund, because when it put its moneys into that "fund, it did not in express language say, I put these in, "in discharge of my indebtedness? It will be borne in "mind that no new consideration passed from the con- "tractor for this contribution of the City to the drainage "fund. No legislative act contemplated direct obligation "on the part of the City. From first to last all meant "local improvement, to be paid by local assessments; and "the contractor, all these years, had only legislative au- "thority, to look to the special assessments for payment. "Its contract was entered into and performed, with knowl- "edge that the only legal right it had for payment con- "sisted in these assessments. Without further consider- "ation, the City put into this fund these bonds, and they "were accepted by the contractor. It is doubtless true "that the motive of the City was to anticipate the collec- "tion of the assessments, and to put into the hands of the "contractor available assets to insure speedy performance "of the work, but obligation of the contractor was to do "the work, and it gave no new obligation, no new consid- "eration, to the City or any other party, for these bonds. "To say after this contribution of the City to this fund, a "contribution without consideration except in discharge "of its debt to the fund, that because it was not expressed "that the contribution was to be taken as in discharge of "the indebtedness, a Court of equity will permit the "contractor, or its assignees, to treat the contribution as "a donation, and charge the contributor as a debtor, "would be a mockery of justice and an insult to equity. "It must be borne in mind that a City is not like a private "individual, with absolute freedon of contract and dona- "tion. It is simply the representative of the citizens and "tax payers, a trustee for their interests; it has no gen- "eral powers of donation, and its contribution to a fund "can never be considered as a donation when there is an "indebtedness to that fund to be discharged. Indeed, if "there were no indebtedness, the contribution, as a whole, "might well be considered as *ultra vires*, and, if by the "issue of negotiable securities to that fund, an indefeasible

"obligation had been assumed by the City, it might in "equity hold that the fund as debtor to it for such amount. "Much stress is placed by counsel for appellant on this "point, and large reliance is placed on the fact that in "these bond transactions there was no declaration of an "intent to appropriate them to the payment of the City's "indebtedness, as assessee, but, as we have indicated, such "omission does not militate against the rights created by "the contribution. If the City, as assessee, owed this "fund seven hundred thousand dollars, it may rightfully "answer to any demand of the contractor, or its assignees, "that it pay such amount into the fund, I have already "paid it, and it is no reply to that answer to say, when "you paid it you did not declare that you paid it in dis-"charge of that indebtedness. It is enough that the City "paid it, and paid it without other consideration than the "discharge of its indebtedness. We think this contention "of the appellant must also fail."

As plain as any fact can be stated in language, this Court has thus declared, that the City has discharged every obligation, to the warrant holders, that may be imagined. The City's bonds went into the drainage fund as a contribution thereto, in the same manner that an equal amount of money would have passed into it, if collected from the drainage assessments. The warrant holders have received from the City an amount larger by about $200,000 than they would have realized, had every dollar of the assessments been reduced to possession. Their position is far better than it would, in all probability, if not certainty, have been, had the City done every act which the bill charges her with having omitted.

The second question certified to Your Honors, namely: Should the decision in the case *James W. Peake* vs. *The City of New Orleans*, 139 *U. S.*, 342, be held to apply to the facts of this case, and operate to defeat the complainant's action, would seem to be easy of solution.

The warrant in the present case differs from that figuring in the Peake case only in a name, which might very pro-

perly, without disrespect, be qualified, as selected for the purpose; in no substantial respect can the warrant held by Warner, the complainant, be distinguished from that sued on by Peake, in the former litigation. As has been said, the latter was issued for the work of excavating canals and building levees, between 1871 and 1876. The former holds a warrant received by Van Norden, as assignee of the Canal Company, in part payment of the price of the sale by him to the City, of the drainage plant and accessories. The 3d section of Act No. 16 of 1876, the authority under which the City of New Orleans made the purchase, expressly provided that the price should be paid in drainage warrants, which were to be issued in the same form and amount as those theretofore issued under Act 30 of 1871, to Van Norden, the transferee of the Company. They were to be acquitted out of the drainage assessments provided for by the Act of 1871. It is obvious that the so-called "purchase" warrants were obligations identical in character with those previously issued for work done. They were of the same form and tenor; were to be acquitted out of the same fund, already established for the payment of the "work" warrants. In no single respect did they differ from the latter. The name even of the payee was the same; the order of payment was in the same terms; the mode and place of their presentment, the endorsement thereon when there were no funds to meet them, all were a mere repetition of the so-called "work" warrants, in so many words. They presented no feature in any respect new to Van Norden. He had been receiving warrants, duplicates of these, in every respect, for four years, as the contractor, assignee of the Canal Company; it was while he was such contractor that the fund, to which he looked for payment, was augmented by the City's issue of bonds; it is a fair presumption, if not a fact apparent, from all proceedings, that he was the recipient of a portion, if not all the bonds. In its Act of purchase, the City did nothing more than tender a price, payable in obligations of a class well known to the vendor. It was a mere continuation of the process, observed by Van Norden and the City

long prior to 1876; its obligation under the "purchase" warrants, added nothing to what it owed under the "work" warrants. The former had no strength or infirmity which were not found in every sense in the latter.

In what sense, therefore, is this Court asked to decree, that the measure of right between the parties here, is different from that found in the Peake case?

It is true, that the contracts and other transactions upon which complainant relies, are to be interpreted under the law of Louisiana, that being the law of place.

It is not correct as a proposition of Louisiana law, that by its act of purchase the City by any warranty, either express or implied, guaranteed that the warrants would be paid. In the terminology of the Civil Code of Louisiana the warrant is an "incorporeal right;" in the sale or exchange of such property, the vendor does not guarantee the solvency of the vendor of the obligation, nor does he guarantee its payment, or that it will be realized in money in any form; his warranty extends to nothing more than the existence of the obligation.

Revised Civil Code, Articles 2646, 2647.
Benner vs. *Van Norden*, 27 *La. An.*, 480.

Therefore, the Louisiana cases cited as authority in appellant's brief have no application. The warrant bears no resemblance to the check of a depositor drawn on his bank. The check is drawn presumably against funds actually in hand. The warrant in this case, was drawn against a fund altogether contingent as to its existence, as well as uncertain in amount, and under the averments of complainant, a fund which at the time of the sale of Van Norden to the City, was not in existence. The case of *Gordon and Gomilla* vs. *Muchler*, 34 *Louisiana Annual*, page 605, is not instructive upon any branch of this case. The other cases cited by complainant are inapplicable to the present controversy, as a slight examination will show.

The cases of *Corcoran* vs. *Riddle*, 2 *La. An.*, 268, and *Johnson* vs. *Frellsen*, 40 *La. An.*, 273, decide nothing more, than that there is a breach of the warranty, where the party

undertakes to sell a judgment which is no judgment, but a mere claim; both these cases confirm the rule as stated by appellee, namely, that the warranty in the sale of an incorporeal right extends only to the existence of the claim. In the cases just referred to, the object of the sale not being that which it was purported to be, which it was represented to be, namely, a debt in the form of a judgment, when in fact the supposed judgment was not valid in law in one case, and in the other a mere unliquidated claim, the warranty was broken by reason of the debt not existing in the form treated by the contract.

The case of *Jenkins* vs. *The Parish of Caddo*, 7 *La. An.*, 559, discloses a simple application of the rule that the warranty does not extend to the solvency of the debtor, but only to the fact of indebtedness. Plaintiff had sold to the Parish of Caddo a piece of real estate, taking a draft on the Shreveport Town Company in part payment of the price. As a matter of fact, there was no indebtedness by the Shreveport Company to the Parish, nor any credit against which a draft could be properly drawn. The claim or incorporeal right represented by the draft had no real existence. Hence the warranty was broken.

Without further discussing them in detail, it is considered sufficient to say, that under Article 2505 of the Louisiana Code, there is no warranty of any kind in a contract of sale, where the buyer is aware at the time, of the danger from which he afterwards suffers, in which case he is considered as buying at his own risk and peril.

Of the unsuccessful prosecution of the drainage system, of the repeated but futile efforts to collect and realize the drainage assessments; of the causes, physical and technical, which made difficult, if not impossible, the successful establishment of the system of drainage, contemplated by the legislation figuring in this case, no one was better informed than Van Norden at the time of his sale to the City. Complainant, as assignee, can have no better title than his assignor, *Pipkin* vs. *Sheriff*, 36 *La. An.*, 781. Van Norden had succeeded to the rights of the Canal Company, in consequence of its failure to execute its contract,

or to realize the assessments made for its benefit. He had seen the necessity of the City issuing its bonds, to provide the contractor himself for the time, with assets more available than the assessments, to construct the works. He found the contract so undesirable, that he was willing to sell the same to the City, taking the drainage fund, uncertain of collection and contingent in amount, as the source from which his price was to come. Under these conditions in what sense, can he be said to have been unaware, of the danger of not realizing his price? As far as observation and experience can bring any fact to the knowledge of man, the danger of the work not being prosecuted to a successful issue, was fully known to him. As to the efficiency of any collection within the power of the City, he had had experience, as in 1876, in a mandamus proceeding, he compelled the City to issue writs of *fieri facias* against the owners of the property; the City answered that the costs of the proceedings would equal, if not exceed, the amount realized, a defence fully justified by the result, which was the collection of $36,000 at an expense of $34,000, under 125 writs issued upon that many judgments.

All the grounds upon which this Court held, that the complainant in the Peake case, must be dismissed, are so many reasons why a similar conclusion should be reached in the instant case. The present controversy is a revival, in a new name, of a suit already adjudged by Your Honors, to have been without merit. The difference between the warrants found in the two, being, only that in one they were issued for work done, and in the other as a price. The obligation in both instances is the same, one being received for one purpose, and the other being accepted for another purpose. In both instances the thing given and received was identical.

If it appears from paragraph of the Bill that the Circuit Court had, prior to the institution of this suit, appointed a Receiver to take full charge of the collections of the drainage taxes, and for this purpose to take possession of all books, papers and records relating to the same; how, then, can defendant make the accounting de-

manded? Any interference with the Receiver would be in contempt of the Circuit Court; possession of the records from which the accounting is to be made, cannot be had, except by sufferance of the Receiver; this suit should be directed against the Receiver and not against defendant; the Court, through its Receiver, having assumed full control of the drainage fund.

The Court is respectfully requested to consider the brief of defendant filed in the Court of Appeals, as well as the one filed for the first time in this Court.

Respectfully submitted.

BRANCH K. MILLER,
Solicitor for Defendant and Appellee.

October, 1895.

FILED
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JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 282.

JOHN G. WARNER, PLAINTIFF IN ERROR,

vs.

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

BRANCH K. MILLER,
Attorney for Defendant in Error.

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SYLLABUS.

A suit brought by an assignee of a warrant made by a municipal corporation, payable to a person named, or order, cannot be maintained in the circuit court unless such suit might have been prosecuted in such court if no assignment or transfer had been made. (Neugas *vs.* New Orleans, 33d Fed. Rep., 198; Rollins *vs.* Chaffee County, 34th Fed. Rep., 91; Wilson *vs.* Knox County, 43d Fed. Rep., 481; Laird *vs.* Indemnity Company, 44th Fed. Rep., 712; Bank of British North America *vs.* Barling, 46th Fed. Rep., 357; Nelson *vs.* Eaton, 66th Fed. Rep., 377; 74th Fed. Rep., 21; Ambler *vs.* Eppinger, 137 U. S., 480; Superior City *vs.* Ripley, 138 U. S., 93; Parker *vs.* Ormsby, 141 U. S., 82; Holmes *vs.* Goldsmith, 147 U. S., 150; New Orleans *vs.* Benjamin, 153 U. S., 411.)

The warrant in this case is issued to Van Norden as transferee of the Mississippi and Mexican Gulf Ship Canal Company, a corporation created by the laws of Louisiana. The warrant is payable exclusively out of the drainage taxes levied under act No. 30 of 1871, in favor of the canal company. The right to such taxes was assigned by the latter to Van Norden. Complainant holds by assignment from the latter. The relief sought here, namely, the payment of the warrant, cannot be had except by enforcing rights of the canal company assigned by it to Van Norden and by him in turn to complainant. The circuit court was without jurisdiction.

By act No. 16 of 1876 the city was authorized to purchase from the canal company and Van Norden, its transferee, all its franchises and privileges, including the right to drainage taxes levied under the act of 1871, the price to be paid in drainage warrants authorized by that act and payable out of drainage taxes. The warrants thus given in payment

are in all respects the same as those issued under the act of 1871 to the canal company and Van Norden for drainage work. (Peake *vs.* City, 36th Fed. Rep., 778; Peake *vs.* New Orleans, 139 U. S., 342 *et seq.*)

The drainage warrant in question here is not a debt in the sense of article 2043 of the Revised Civil Code of Louisiana. In payment of the purchase price the city gave warrants conveying no idea of debt whatever, but payable solely out of drainage taxes.

By the constitutional amendment which took effect January 1, 1879, the city of New Orleans was prohibited from increasing her debt in any manner or form or under any pretext. The drainage warrants up to that date were not debts of the city, but were limited as to their payment to a specific designated fund, so far as the same was sufficient for that purpose; subsequent to the amendment the city could by no act or omission or commission convert these warrants into debts.

IN THE

Supreme Court of the United States.

No. 282.

JOHN G. WARNER, PLAINTIFF IN ERROR,

vs.

CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

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To the discussion found in the original brief of the defendant in error, it has been deemed proper to add this supplemental brief.

I.

As regards the want of jurisdiction set up by the demurrer, it is fair to say that that issue is governed by the following rules:

If a suit be brought by an assignee on a chose in action payable to bearer, but made by a natural person—i. e., not by a corporation—there is no jurisdiction in the circuit court, unless such suit could have been brought by the assignor. If the obligation be *payable to bearer* and made by a corpo-

ration, such a suit may be maintained in the circuit court; if made by a corporation, but not payable to bearer, that court is without jurisdiction. A suit by an assignee of any obligation of a corporation, of whatever character, which requires assignment to convey title is excluded from the jurisdiction if the assignor were incompetent to bring such suit.

Such has been the interpretation placed upon the act of Congress of August 13, 1888, by a series of decisions of the circuit courts themselves.

In Neugas *vs.* New Orleans, 33d Fed. Rep., 198, the suit was on certain claims assigned to him by citizens of Louisiana, which could be transferred only by assignment. It was held (p. 198) that since the obligations were of such a nature as to require assignment and the assignor could not have maintained an action in the circuit court before the assignment, plaintiff, the assignee, could not do so.

In Rollins *vs.* Chaffee County, 34th Fed. Rep., 91, the suit was by an assignee upon county warrants payable to a person named therein or his order. In the absence of an averment that the assignor was qualified to sue, the jurisdiction of the court was denied, this upon the authority of Neugas *vs.* New Orleans, in which the meaning of the first section of the act of 1887 (of which that of 1888 was an amendment to correct its enrollment) was declared to be well stated. It was said that the senate amendment which withdrew from the rule of exclusion obligations payable to bearer, when made by a corporation, was intended to retain jurisdiction over that large class of securities made by corporations, railroads, and the like, which were sold in open market and negotiable by delivery (p. 91).

The distinction between the two kinds of choses in action as to which jurisdiction was on one side retained and on the other denied was well illustrated in the cases tried together with those above cited by name. In the former the

warrants, though made by a corporation, were payable to bearer, and as to these the jurisdiction was maintained.

In Wilson *vs.* Knox County, 43d Fed. Rep., 481, the cause of action was certain county warrants payable to a person named, who had assigned them to the plaintiff. The assignee, being a citizen of the State of Missouri, in which Knox County, the defendant, was situated, was incompetent to sue in the circuit court. The contention of the plaintiff was that the instruments sued upon were "not payable to bearer and are made by a corporation." Justice Miller, sitting on circuit, held this to be an erroneous view of the law; that Congress did not intend to give the federal courts jurisdiction of all suits by assignees of promissory notes and other choses in action, if the assigned choses were made by a corporation and were not payable to bearer; that that construction would extend the jurisdiction of the federal courts, without any apparent reason, over a class of suits by assignees of choses in action never before within their jurisdiction, whereas the main purpose of the act of 1887 (under consideration) seems to have been to curtail their jurisdiction; that the general rule enunciated by the statute was that the federal courts should not have jurisdiction of a suit by an assignee of a promissory note or other chose in action when the assignor could not maintain such a suit; that the clause "if such instrument be payable to bearer and be not made by a corporation" operated as an exception to the general rule and gave the federal courts jurisdiction of those suits by assignees where the action was founded on an obligation made by a corporation, payable to bearer, and negotiable by mere delivery; that the instruments sued upon, though executed by a *quasi* corporation, were not *payable to bearer*, and hence that the assignee of the warrants had no greater right to sue in the circuit court than the original payee. Nesmith *vs.* New Orleans and Rollins *vs.* Chaffee County, mentioned above, were cited approvingly.

Laird *vs.* Indemnity, etc., Assurance Co., 44th Fed. Rep.,

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712, was a suit by an assignee to recover upon a contract of reinsurance and for reformation of the policy if necessary. The assignee was an alien corporation and so was the defendant. It was declared that no federal question was involved; that the suit could not have been prosecuted in the circuit court by the original parties to the contract upon any theory of diverse citizenship, as neither one of them was a citizen of any State of the federal Union. The case being one of removal and the act of 1887 (1888) restricting the right of removal to suits of which the circuit courts were given jurisdiction by section 1 of the act, and there being no jurisdiction in such a case as that before the court, it was remanded to the state court.

In Bank of British North America *vs.* Barling, 46th Fed. Rep., 357, the action being upon a bill of exchange drawn by a corporation in favor of itself and by it endorsed in blank, thus making it payable to bearer, the converse of the rule invoked here was applied and the jurisdiction maintained. The bill, being payable to bearer and made by a corporation, was declared to be within the exception to the general rule of exclusion. This case, with Stewart *vs.* City of New Orleans and Garrity *vs.* New Orleans Packing and Canning Co., 33d Fed. Rep., 196, decided with the Neugas case, and Barnum *vs.* Custer County, 34th Fed. Rep., 91, decided with Rollins *vs.* Chaffee County, by implication recognize the restriction relied upon by defendant in error, exhibiting as they do in bold contrast the cases in which jurisdiction is found and those in which it is denied.

Nelson *vs.* Eaton, 66th Fed. Rep., 377, was a bill to foreclose a mortgage to secure the payment of a negotiable promissory note. The bill alleged the assignment of the note and mortgage to the complainant, but did not aver that the citizenship of the assignor was such that he could have maintained the suit in the circuit court if no assignment had been made. The defendant failing to answer, a decree of *pro confesso* was entered. On appeal to the circuit court

of appeals the decree was set aside on the ground that the bill did not show that the circuit court had jurisdiction of the suit, the act of March 3, 1877, prohibiting suits in courts of the United States by assignees of choses in action, unless the original assignor was entitled to maintain the suit, save suits on obligations made *payable to bearer and executed by a corporation.* In support of this conclusion Neugas *vs.* New Orleans, Wilson *vs.* Knox County, and Rollins *vs.* Chaffee County were cited; also Plant Inv. Co. *vs.* Jacksonville, 152 U. S., 71–76; New Orleans *vs.* Benjamin, 153 U. S., 411, 432, and 435.

In 74 Fed. Rep., 21, the doctrine of the cases cited was affirmed.

It thus appears that, so far as the jurisprudence of the circuit courts and the circuit court of appeals for the eighth circuit are authority, it is settled law that the assignee of a chose in action *not payable to bearer*, though *made by a corporation*, cannot maintain a suit in the circuit court unless such court would have had jurisdiction over such a suit by his assignor.

Nor is it any the less true that the adjudications of this court are in entire accord with those of the cases cited.

In Ambler *vs.* Eppinger, 137 U. S., 480, plaintiff, a citizen of New York, assignee of a citizen of Florida, brought an action against defendants, also citizens of Florida, for the cutting down and removing of timber from the land of the assignor; it was held that the act of 1877 did not apply to such an action of trespass, but covered only such suits as arose upon contracts of the original parties, and not founded, like that in controversy, upon a trespass on property; that the exception of the act, aside from foreign bills of exchange, was limited to suits on promissory notes and other choses in action where the demand sought to be enforced was *represented by an instrument in writing, payable to bearer, and not made by a corporation.*

Superior City *vs.* Ripley, 138 U. S., 93, presented an issue

requiring the application of the exclusion clause of the act of 1888. Plaintiff by assignment acquired from a contractor his claim against the city for compensation for certain public work. The contractor was disqualified from suing in the federal court. The city on its presentation accepted the order of the contractor to pay the plaintiff. While it was decided that the acceptance of the city created a direct relation between itself and plaintiff, who was thus suing in his own right upon the acceptance and not upon the assignment, the opinion recognized that but for the acceptance the court would have been without jurisdiction.

Parker *vs.* Ormsby, 141 U. S., 82, was a suit upon a promissory note payable to a certain payee or order. The note was endorsed by the payee to a bank and by it to the plaintiff. The action was against the maker, no averment being made as to the citizenship of the payee. The bill was dismissed on the ground that the note was not payable to bearer, but required an assignment to convey the title. Hence, the requisite citizenship of the assignor not being set up, jurisdiction was denied. It appears from the opinion that if the note had been made by a corporation jurisdiction would have been maintained.

In Holmes *vs.* Goldsmith, 147 U. S., 150, the maker of a note was sued by an endorsee holding under the endorsement of the payee. The citizenship of the latter did not appear, but evidence was allowed to show that the maker became such for the benefit and accommodation of the payee, who was the real debtor, having no action against the maker. The endorsee being a citizen of the State of New York and the maker and payee citizens of Oregon, where the suit was brought, jurisdiction was maintained on the ground that an assignment was not essential to the title of the plaintiffs; that they held their rights directly against the defendant, and the act of 1887 did not apply. The opinion impliedly affirms that were it not for the special circumstances developed by proof the court would have

been without jurisdiction—that is to say, if the rights of the plaintiffs had depended upon an assignment the bill would have been dismissed.

In New Orleans *vs.* Benjamin, 153 U. S., 411, the suit was brought by an assignee of a warrant payable to a person named; the warrant was issued by the Board of Metropolitan Police, a corporation. This suit in all respects is a counterpart of the present controversy so far as concerns the question of jurisdiction; the instrument there, like here, required an assignment to effect its transfer; it was made by a corporation. The opinion held that the circuit court was without jurisdiction by reason of the absence of any showing that the assignor could have maintained the suit, basing its conclusion upon that part of the act of 1888 which declares that the federal courts shall not have cognizance of any suit to recover the contents of a chose in action in favor of the assignee, unless such suit might have been prosecuted in such court to recover the contents, if no assignment had been made.

The warrant in the present case is payable to the order of Van Norden, *transferee* of the Mississippi and Mexican Gulf Ship Canal Company; it is to be paid out of any funds in the city treasury to the credit of the company; it is declared to be issued in accordance with the provisions of act No. 30 of the session of the General Assembly of the state held in 1871, this act being the charter of the company and imposing drainage taxes for its benefit alone. In the body of the warrant the fund out of which it is to be paid is again declared to be such as is to the credit of the company and is to be charged against the latter. (See Record, p. 141.)

It is claimed, however, by plaintiff in error that the city by its purchase from Van Norden and the company, by virtue of the act of 1876, entered into direct relation with Van Norden, who was competent to sue, and hence the plaintiff, his assignee, can maintain the suit.

It will be noted, however, that not only in the warrant,

but also by the act of 1876 and the purchase made thereunder, Van Norden is dealt with solely in the character of a *transferee;* he appears and is treated as not selling any rights acquired otherwise than by transfer from the company; his character as assignee of the company is preserved throughout.

The relations between Van Norden and the company and the former and the city exhibit at all times that he was standing in the shoes of the company and enjoying its rights by assignment. He sets up no title, he acquires no interest, he conveys no right, except such as were originally granted to the company. On the 22d of May, 1872 (Record, p. 135), the company, owing to the want of funds in the city treasury to pay its warrants, which were then convertible into cash only at a discount of 25 per cent. or more, covenanted with Van Norden that he should make it an advance of $150,000 for the discharge of the expenses of doing its work, to be reimbursed out of warrants, sums of money, or other revenues accruing to the company under act No. 30 of 1871; and in execution of the agreement there was assigned to Van Norden all right, title, interest, claim, and demands of the company in and to the privileges granted it under the act of 1871. On November 22, 1872, Van Norden acquired from the company certain steam derricks, dredge-boats, etc., in part payment of the advances which he had made (Record, p. 138). The result of these two transactions was to vest in Van Norden all the rights, privileges, and franchises, including the right to drainage assessments and taxes conferred upon the company by the act of 1871 and all the dredge-boats and other paraphernalia for the execution of its work. In this condition, on November 7, 1876 (Record, p. 125), Van Norden, individually and as *transferee* and *pledgee* of the canal company, transferred to the city of New Orleans all right, title, and interest in the privileges, contracts, advantages, etc., which the company had

by virtue of the act of 1871, and also certain dredge-boats, barges, derricks, etc., all purtenant to the work of drainage.

It is true that Van Norden appears in the act of purchase not only as transferee of the company, but also in his character of an individual, but this in no respect weakens the position of the defendant in error. His appearance as an individual was to convey title to the tangible property sold, namely, dredge-boats, barges, etc. These he had bought outright from the company, and as corporeal property belonged to him as owner. He held it not as an assignee, but as a purchaser of property, and his appearance in the act of sale *as an individual* was only for the purpose of selling to the city the property which had a physical existence. As owner of the dredge-boats, etc., simply, he had none of the rights given the company by the act of 1871. He acquired the dredge-boats by the conveyance of November 22, 1872, but all claims that he might have to drainage warrants, drainage assessments, or drainage taxes under the act of 1871 he acquired solely by reason of the assignment made by the company on the 22d of May, 1872. Were it not for this conveyance he would have had none of the privileges and franchises which, as transferee of the company, he undertook to pass to the city by the act of the 7th of June, 1876. It is therefore clear that, in this act of purchase by the city, Van Norden, *as an individual* acting *in his own right*, appears only for the purpose of conveying a title to the dredge-boats, barges, etc., while it is in his character of *transferee* and *pledgee* of the company that he conveys the franchises vested in the company by the act of 1871. It is in his character as transferee alone that he could have any right to a drainage warrant or obtain the means of paying it under the scheme provided by the act of 1871.

The differing purposes of Van Norden's doings as an individual and those as a transferee are made apparent by the recital in the act of sale (Record, p. 128) that the "*sale of the rights, * * * franchises, privileges * * * by*

the Mexican Gulf Ship Canal Company and by W. Van Norden, as transferee and pledgee aforesaid, and the sale of such dredge-boats, barges, and other articles and effects of the said Van Norden in his own name individually are made and accepted for the price and sum of $300,000, payable in drainage warrants." The canal company, as though the transfer of its franchises and privileges were deemed not sufficiently conveyed by Van Norden as transferee, joins in the conveyance. The price in drainage warrants was paid (Record, p. 129), not only in consideration of the sale, but in full settlement of all existing claims for damages which the *company* and Van Norden as *transferee* had or might have against the city, and the canal company, through its president, authorized the city to deliver the warrants to Van Norden, which was done, the company, through its president, then and there giving its full and entire consent.

The city had no authority to make this purchase, except that conferred by the act of the General Assembly No. 15 of 1876. Its right to act, founded solely upon the statute, extended no further than the authority given. It was authorized to purchase from the *company* and its *transferee* all rights, franchises, etc., arising in its favor or that of its *transferee* under and by virtue of the act of 1871 and to purchase all tools, machines, boats, etc., belonging to the company or its *transferee* used for or pertaining to the drainage work authorized to be done by the said act.

By section 3 the character and manner of payment of the price was explicitly described. It was to be paid in drainage warrants of the city of New Orleans, which were to be issued in the same form and manner as those already issued to the *transferee of the company* under the act of 1871 for work done. They were to be made payable out of the drainage assessments levied under that act. The character of the price received by Van Norden was well known to him. He himself, as assignee of the company, had conducted the work of drainage from November 22, 1872, until June

7, 1876, the date of the city's purchase. During this period he had received in large sums drainage warrants identical with those for which he sold to the city. The foundation of the warrants and all means of their payment was the act of 1871, which created rights and franchises exclusively in favor of the canal company, a corporation of the State of Louisiana. Every dollar provided for their payment originated and was collected as property of the company. The power to make assessments and their obligatory force existed in favor of the company alone, and to this date would have remained the property of the company had it not been for this assignment to Van Norden. All the relief sought by the complainant here finds its origin in the act of 1871 and nowhere else. It is a privilege or franchise which is here sought to be enforced, unchanged in its character by the transfer, first, from the company to Van Norden, and from the latter to the extent of his warrants to complainant. The company, being incorporated by the laws of the state of Louisiana, must be regarded as a citizen of that state, and hence incompetent to have brought this suit in the circuit court. This exclusion of the present controversy from federal jurisdiction is in no respect avoided by the company's assignment to Van Norden, Though he could have brought a suit by reason of his citizenship, this avails nothing to the complainant, for the company, his assignor, was incompetent to sue. The disability of Van Norden necessarily falls upon complainant, who is a mere subsequent holder of the warrants sued upon.

II.

Complainant's bill is framed upon the theory that the city, as an absolute debtor, has become liable for the payment of his warrants, which by the law under which they were issued and by the express stipulation of his assignor's

contract of sale were payable simply and exclusively from the collections of drainage taxes.

These taxes were assessed under a system of drainage projected many years since. An attempt to carry it into effect was made by the Mexican Gulf Ship Canal Company with the success shown by the agreement between itself and Van Norden (Record, p. 135 *et seq.*), wherein it was declared that the drainage warrants were wholly inadequate as a means for carrying on the work, and relief was sought from Van Norden.

From November 22, 1872, the work was continued by the latter, complainant's assignor, and afterwards prosecuted for his benefit by the city itself. From the showing made by the record it is fair to say that when Van Norden and the company sold out to the city in 1876 the whole scheme was a demonstrated failure, there then being no real basis to enforce drainage taxes for local improvement, which had then failed of its object, the taxes being imposed with reference to future benefits expected to be derived from an unsuccessful system of drainage. The history of the claim and of its barren result is to be found in the decisions of this court, the circuit court, and the supreme court of Louisiana. (Peake *vs.* New Orleans, 139 U. S., 360; Peake *vs.* City, 30 Fed. Rep., 788; Davidson *vs.* New Orleans, 34 La. An., 170.)

The bill charges that the city is liable because it took charge of the drainage system and undertook without success to make it effective. This matter is so completely discussed and discarded in a previous opinion of this court as, perhaps, to render unnecessary any reference to that part of the bill. (Peake *vs.* New Orleans, 139 U. S., 360.)

The present bill is an attempt to revive that litigation on the supposed difference between the warrants sued upon there and those set up in the instant case. The warrants sued upon in the Peake case were styled "work or construction warrants;" those sued upon here are for the occasion

styled "purchase warrants." The difference between the two extends no further than the terms by which they are respectively designated. Both are issued under the act of 1871, which provides the mode by which the warrants of both descriptions are to be paid. The act of 1876, by authority of which the city made its purchase, expressly declared that the price was to be paid in warrants authorized by the act of 1871. The statute of 1876, in itself, propounds no scheme by which the warrants are to be retired, but refers the warrant-holders to the drainage assessments levied under the act of 1871 as the source from which they are to be satisfied. The so-called "work warrants" avowedly had no means of payment except that provided by the act of 1871, and the statute of 1876 places the "purchase warrants" upon the same footing, so far as the city's liability is concerned. Whatever is true as to the "work warrants" is likewise true as to the "purchase warrants" (Peake *vs.* City, 38th Fed. Rep., 782). Of the two classes the first were issued prior to 1876 for drainage work claimed to have been done. The present suit is based upon warrants issued in or subsequent to 1876 under the contract of purchase by which the city acquired the drainage machinery, franchises, and privileges of the dormant Mississippi and Mexican Gulf Ship Canal Company for a price in warrants, payable in drainage taxes when collected (Record, p. 14, par. 14, of the Bill; act No. 16 of 1876), the purchase, as we have seen, being made not only from Van Norden, its *assignee*, but also from the *company itself*.

The decision of this court, however, in the Peake case, and that of the circuit court in the same case, 38th Fed. Rep., 782, have really closed any question that might be made as to a difference in the two classes of warrants. The Peake suit was brought upon "purchase warrants" the same as those sued on here, as well as the so-called "work warrants," as will be seen by the opinion of the circuit court and by examination, if such be permitted, of the record of the Peake

case, on file in this court. In fact, in the circuit court, in behalf of complainant the argument was made that *$300,000 of the warrants sued upon* were for the purchase price of the machinery and contract which the legislature authorized the city to buy, as provided in act No. 16 of 1876.

It thus appears that the very class of warrants sued upon in this case were declared upon in the former litigation, and hence the conclusion unfavorable to the warrant-holders reached by this court and by the circuit court covers the warrants relied on here.

In disposing of the contention made in the Peake case that "purchase warrants" stood upon a higher footing than "work warrants," the court said:

"The answer to this contention is that while the city was by the legislature required to buy, it was required to pay in warrants against the drainage fund. This class of warrants was placed, therefore, by the legislature in precisely the same category as the other drainage warrants, issued for work. The holders of them were as far from having a claim against the city as were the holders of the other warrants against the fund, and with reference to both classes of warrants no rights could spring up which would increase the debt of the city of New Orleans to the holders of either class of warrants. This view would, in our opinion, be conclusive upon this question even if it had been established that the city had violated any of its duties as trustee" (p. 782).

The complainant's assignor received these warrants with the explicit statement and full knowledge of their method of payment. The same knowledge is carried to every holder by the distinct recital to that effect in the warrants themselves.

The bill propounds further that the city is bound for the payment of the warrants because of the warranty conceived to have arisen from the purchase from Van Norden and the issue to him of the warrants.

In support of this contention the article of the Revised

Civil Code of Louisiana, No. 2642, *et seq.*, relative to the assignment of debts, is referred to.

Under this article, when a debt is assigned there is no warranty of the solvency of the debtor; but in this case there is, as a matter of fact, not even the assignment of a debt. An assignment in this connection is the transfer from one person to another of a credit, claim, or debt due by another person (Revised Civil Code of Louisiana, articles 2642, 2643, and 2644). The city, in payment of its purchase price, delivered to Van Norden warrants conveying no idea whatever of a *debt* which it owed, but payable solely and exclusively out of a designated fund, of the character and condition of which Van Norden was fully informed, namely, the drainage taxes. The articles of the code cited have no application. Neither by the act of purchase nor the statute under the authority of which it was made is there any implication that the city had not paid all that it might have been supposed to owe to the drainage fund. If the city, before that purchase, had discharged any or all obligation, neither the statute nor the act of purchase can effect the renewal of a liability, if it ever existed, completely discharged. Nothing in the act of sale conveys the slightest intimation of such a purpose; nothing of the kind was accomplished by the issue of the warrants. The drainage assessments began many years before the purchase. Under a system which many believed would never secure drainage for the city, the collection of drainage taxes was attended with many difficulties, but it had been going on for many years, and while the mass of the taxes were uncollected, some amount had been paid, notably the city had made its contribution to the fund by its issue of bonds, under section 16 of act No. 73 of 1872, and this with all the notoriety attending a public statute. By the act of purchase Van Norden acquired the right to only such drainage taxes as were uncollected. Of all this he must be deemed to have been fully apprised. He became the assignee of the canal

company in 1872, four years before the purchase by the city. He stood in that relation and was doing work of construction when the issue of bonds was made. It is reasonable that he be charged with a knowledge, and with the effect of that payment. All, therefore, that the issue of warrants conveyed was the right of their holders to receive the uncollected drainage taxes. If these taxes could have been collected there would have been ample funds with which to take up every warrant, but because the collection was impossible there is no room for the complainant or his assignee to found upon the purchase by the city a warranty that its own liability, if it ever existed, had not been already paid and discharged, the fact being that any supposed amount which the city owed had been paid, and overpaid by its issue of bonds.

The attempt of the complainant in his supplemental brief to place the warrants upon the footing of a check upon a bank drawn by a depositor, and that in consequence the presentation of a warrant to the city created a liability to pay it, finds no support in reason or in any of the authorities cited, especially that principally relied upon. The case of Gordon & Gomilla *vs.* Muchler, 34 La. An., 604, does affirm that the depositor drawing a check against funds to his credit acquires a right of action against the bank. This question has been decided variously by the courts of other States. The line of authority has no pertinence to the contention of complainant. He holds no check nor any instrument in the faintest degree resembling a check against any fund to his credit; he holds a warrant drawn on and payable out of a fund *when realized*, but not before. On a warrant and a right of payment thus restricted, he can claim no other judgment than that previously rendered in the case of Peake—that is to say, one payable out of drainage funds as they are collected.

It is insisted again by complainant that the city is estopped from pleading the discharge of its obligation, if

any, resulting from the issue of $1,600,000 of its bonds for the benefit of the drainage fund, issued under section 17 of act No. 73 of 1872. The supposed liability of the city for any part of this drainage work rests mainly upon the inclusion of streets and public places as property to be assessed. It is difficult to maintain that the system of assessment for drainage taxes ever warranted the levy of the same against public streets. The assessments contemplated were to be against individual property-holders and not against streets or public places (act 165 of 1858, section 7). The assessments could have no greater effect than the legislative act under which they were made.

The idea of the liability of the city rests upon an *obiter* thrown out in the case of draining company, praying, etc., 11th La. An., 338–373, a case involving no other question except that arising upon the objection of property-holders that drainage taxes, although local assessments withdrawn from the rules of equality applicable to general taxation, were, notwithstanding, unconstitutional by reason of the equality provision in the state constitution.

The discussion, however, of this question of liability is utterly immaterial, as this court properly observed in its decision in the Peake case, for if it existed it certainly was satisfied by the issue of the bonds of the city. Why should not complainant be bound by this payment of the city, not only quite as effectively, but with greater reason, than any holder of drainage warrants.

Reference is made in complainant's brief to the homologation of the assessment-rolls subsequent to the issue of these bonds, and those judgments of homologation, denoting no payment, are urged by the complainant against the offset which the city claims. The assessments exhibited by the rolls were projected years before the issue of the bonds. The drainage acts provided for assessments based on future work. (See act 65 of 1858, sections 7 and 8; act No. 191 of 1859, section 2; act No. 57 of 1861, section 1.) The assess-

ments were designed to exhibit the work to be done and the costs of the work to the property-owner, but it was no part of the rolls to exhibit payments, least of all payments such as was accomplished by the issue of the bonds of the city, and covering the past as well as any future liability of the city, if any liability ever existed. Hence the approval or homologation of these assessment-rolls did not in the least conflict with the satisfaction previously made by the city.

Again, the bill does not charge or even aver that the assignor of complainant did not know of this legislative act. He claims that he does not know the use that was to be made of it, but he is certainly to be deemed apprised of the legal result of that issue of bonds. The contention that the complainant or his assignor is not to be deemed affected by the satisfaction accomplished by that bond issue of all his pretensions is calculated to afford him the least support in his present enterprise. The bill in this case shows that he became the assignee of the Mexican Gulf Ship Canal Company in 1872. Every warrant thereafter issued was to Van Norden, the complainant's assignor. It was for his own benefit, or his assignees and the holders of drainage warrants, that the bond issue was made, and he knew better than any one that the funds with which he was paid for drainage work subsequent to 1872 were paid from the large contribution made by the city to the drainage fund. With what semblance of basis, then, can his assignee now urge that when he sold to the city in 1876 he was in any manner deceived or misled into the error of supposing that the city had not made that payment of which he and his assignees had been the beneficiaries? His connection with this drainage system and drainage warrants, probably antedating 1871, but certainly from first to last from 1871 to 1876, is utterly inconsistent with the position he now endeavors to sustain, that the city is estopped from a defense of payment necessarily known, or which should have been known, to him, and which required no disclosure. With that full

knowledge he took the warrants, payable out of the drainage taxes to be collected, and with no title whatever to exact payment from the city of drainage taxes, which, if ever due, it has already discharged. He is bound by that payment with far greater reason than others not bearing his relation to the drainage warrants. The decision of this court maintained that defense as against all others. With peculiar propriety it applies to the complainant and his assignor.

But the complainant's bill encounters another and in itself an insuperable difficulty. The drainage warrants were certainly not the obligations of the city of New Orleans originally. The drainage proposed was for the benefit of the property-holders, and was to be provided for by local assessments, to be borne by them and not by the general fisc of the city. (See Boroughs on Local Assessments, p. —; Cooley on Taxation, p. 611.) This bill undertakes to aver that by the act of the city of New Orleans in 1876 these warrants became part of the debt of the city of New Orleans, and, stripped of their character of local assessments, binding only the property-holders; but in 1874, before these purchase warrants were issued, the constitution of the State of Louisiana was amended so as to forbid the city of New Orleans, as expressed in the amendment, from further increasing *her debt in any manner or form or under any pretext.* (See Acts 1874, p. 56.) After the first of January, 1875, no evidence of indebtedness or warrant for the payment of money was to be issued by any officer of the said city except against cash actually in the treasury; this not to be construed to prevent a renewal of bonds at par or the issuance of new bonds in exchange for other bonds, provided the said debt be not thereby increased, *nor to prevent the issuance of drainage warrants to the transferee of a contract under act No. 30 of 1871, payable only from drainage taxes and not otherwise.*" The complainant refers to this constitutional amendment in his brief, but makes a use of it that does not readily occur. It is urged that the amendment was an appropriation of the

drainage taxes, and, as we understand the argument, which precluded any claim of the city of New Orleans against the fund which would consume it. The city of New Orleans makes no claim against the fund. All it does claim is that it paid to that fund all that could be exacted. Again, he claims that in answering the suit brought by the holders of drainage warrants against the city there was no defense by the city of any claim based upon the payment. That only shows that there was an omission of defenses in that suit; but there is nothing before this court to strip the constitutional amendment of its plain effect in forever excluding these drainage warrants from becoming the obligations of the city of New Orleans. This is manifest in the entire frame of the amendment, but the prohibition is made specially applicable to these very drainage warrants. To guard against any possible inference against any future issue of drainage warrants the amendment preserved the right to issue drainage warrants under act No. 30 of 1871; but payable only from drainage taxes, and not otherwise. All the rights that could be claimed for drainage-warrant holders, issued under the act of 1871, were preserved, but the amendment repeats emphatically that, whenever issued, they should be payable only out of drainage taxes. Therefore there confronts the complainant the unqualified prohibition in the organic law, fatal to his present pretension, that these are obligations of the city of New Orleans and were invested with that character by the act of purchase in 1876, passed two years subsequent to the constitutional enactment. This is the precise view taken by the circuit court in the previous litigation—that is to say, that the amendment forbade any recovery. (Peake vs. City, 38th Fed. Rep., pp. 778–781.)

We have thus endeavored to follow the complainant in the argument pursued in his briefs, and it is submitted that, in any point of view, the first question certified should be answered in the negative in so far as it seeks an answer to the question whether the city is estopped from pleading

in its defense to this suit that payment which this court has already recognized, applying with force certainly equal, if not greater, to the complainant in this case than to any other warrant-holder; and it is further submitted that the decision in the case of Peake *vs.* City of New Orleans, 139 U. S., p. 342, the subject of the second question specified, should be answered in the affirmative.

There is nothing to take this case out of the operation of that well-reasoned opinion and no reason to permit the renewal of a litigation subsequently upon the same grounds as those upon which the previous suit was brought.

Respectfully submitted.

BRANCH K. MILLER,
Attorney for Defendant in Error.

MARCH, 1897.

Joint Resolution

Submitting an amendment to the constitution of the State to limit the debt of New Orleans, and the issue of warrants by the officers; and prescribing certain penalties.

Section 1. *Be it resolved by the Senate and House of Representatives of the State of Louisiana in General Assembly convened,* (two-thirds of the members elected to each House agreeing thereto), That at the general election for members of the General Assembly, which will take place in November, 1874, an amendment to the constitution of the State shall be submitted to the qualified electors of the State for their ratification or rejection in the words following:

Article —. The city of New Orleans shall not hereafter increase her debt, in any manner or form, or under any pretext. After the first day of January, 1875, no evidence of indebtedness or warrant for payment of money shall be issued by any officer of said city, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased, nor to prevent the issue of drainage warrants to the transferee of contract, *under act No.* 30 *of* 1871, *payable only from drainage taxes, and not otherwise;* any person violating the prohibitions, [provisions] of this article shall, on conviction be punished by imprisonment for not less than two nor more than ten years, and by fine of not less than three dollars nor more than ten thousand dollars.

Sec. 2. *Be it further resolved, etc.,* That at said next general election, the wishes of the electors, in the premises, shall be expressed by printed or written ballots, as follows:

"For the amendment limiting the debt of New Orleans;" or, "Against the amendment limiting the debt of New Orleans," and the said ballots shall be counted and returns made, and the result declared as in the case of election of State officers.

(Signed) Charles W. Lowell,
Speaker of the House of Representatives.

(Signed) C. C. Antoine,
Lieutenant Governor and President of the Senate.

Approved February 24, 1874.

(Signed) William P. Kellogg,
Governor of the State of Louisiana.

A true copy:

P. G. Deslonde,
Secretary of State.

No.
167-467
Supreme Court of the United States.
FILED
APR 24 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 282.

JOHN G. WARNER

vs.

THE CITY OF NEW ORLEANS.

SECOND SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

BRANCH K. MILLER,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

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JOHN G. WARNER

vs.

THE CITY OF NEW ORLEANS.

SECOND SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

SYLLABUS.

A municipal corporation cannot increase its debt when forbidden by the constitution, no matter how necessary the public work for which such increase of debt is incurred. Prince *vs.* Quincy, 105th Ill., 138-215; Sacket *vs.* New Albany, 88th Ind., 473; Valparaiso *vs.* Gardner, 97th Ind., 1; National Bank *vs.* Independent District, 39th Ia., 490; Davis *vs.* Des Moines, 71st Ia., 501; Scott *vs.* Davenport, 24th Ia., 208; Council Bluffs *vs.* Stewart, 51st Ia., 385; Read *vs.* Atlantic City, 49th New Jersey L. (20 Vroom, 558); Appeal of City of Erie, 91st Pa. St., 398; Buchanan *vs.* Litchfield, 102d U. S., 278; Litchfield *vs.* Ballou, 114th U. S., 190; Doon Township *vs.* Cummings, 142d U. S., 366.

In the closing argument for plaintiff in error it was urged that, the city having accepted Van Norden as a vendor, he could sue in his own right. It will be remem-

bered, however, that Van Norden was dealt with as an individual only, as concerned the dredge-boats, etc., which he purchased from the canal company in November, 1872, while his status as transferee of the franchises and privileges, including the right to drainage taxes resulting from the assignment to him in May, 1872, is preserved. The right asserted here is one which he acquired by the assignment of May, 1872.

It is said that the bond issue of the city did not pay the assessments against private parties. This is true; but it unquestionably did discharge any liability of the city, if it ever existed, as assessee of streets and other public places. The assessments against the city on this account aggregated, say, not more than $700,000, leaving about $900,000 of taxes against private owners, under the argument of plaintiff in error, unaffected by the issue of the city's bonds. It is for these taxes that complainant sets up the city's liability resulting from her failure to complete the scheme of drainage originally contemplated; but such liability, if it exists at all, was completely discharged by the bonds. If all the taxes which it is complained the city failed to collect had been realized, they would not have exceeded $900,000, the difference between what is claimed from the city herself and the total sum of the taxes assessed when the bonds were issued, namely, $1,400,000. If the city be made liable on the grounds set up in the bill, the drainage fund would have received, first, in the form of bonds, the whole of the balance due, if at all, by private owners, and again the same sum from the city, who, complainant insists, has by neglect and mismanagement become liable for the same. In other words, the drainage contractor, when the entire sum which could be possibly realized was $1,400,000, composed of sums claimed from the city herself for assessments against streets, etc., and other sums due by private owners, receives from the city $1,600,000 of its bonds, which enriched the fund by $200,000

more than could ever be due it. Of the sum represented by the total bonds issued, about $900,000 was claimed from private persons, for which, under the averments of the bill, the city has become responsible. If this latter contention were allowed, the fund would be increased from $1,400,000 to about $2,300,000, which is far beyond the utmost that complainant could have realized if the drainage scheme had been prosecuted by the city to a successful conclusion.

Section 13 of act No. 73 of 1872 did not dedicate the uncollected drainage taxes to the payment of the bonds, except so far as there might be a surplus remaining after the payment of the warrants. It was only after these were discharged that the taxes could be used for the purchase of bonds; thus the argument that the bonds were a charge on the drainage taxes, instead of the payment, is not well founded. The rights of the warrant-holders were secure, and only after they were fully satisfied was a dollar of the drainage taxes to be used for the retirement of the bonds. That there are warrants outstanding and unpaid to a large extent, and hence that the bonds were to no extent retired with drainage taxes, the bill itself furnishes full evidence.

At the time of the purchase the city knew that its own liability, if any existed, was discharged. Van Norden must have known this also. Both knew that there remained about $900,000 of assessments against private property then due, if due by any one, by private owners. This was more than sufficient to pay the purchase price of Van Norden's sale. To the contention that the city by neglecting to prosecute the work of drainage and inciting opposition to the same, thereby destroying the fund out of which the warrants were to be paid, by reason of which she has become the absolute debtor of all taxes due by private persons, it is a sufficient answer to say that this sum, as a matter of fact, whatever her intention, she has already paid by her bond issue and its payment cannot be duplicated, as is proposed by complainant.

The constitutional amendment of 1874 prohibited the city from adding to its debt under any pretext whatsoever. The prohibition is sweeping and extends to any increase of debt in any manner or in any form; it matters not how necessary the work of drainage may be or may have been considered. The purpose of the amendment was to strip the city of any discretion whatsoever as to the increase of its debt. The debt could not be augmented, however necessary in the city's judgment. Of all of this Van Norden had full notice when he sold to the city.

It matters not how great may be the necessity, real or apparent, for the city to incur debt beyond the constitutional limit, the prohibition, and not the necessity of the expense, controls. This is well settled by authority. A limitation on indebtedness imposed by constitution or by charter extends to all forms of debt, bonded or floating, and embraces all transactions which may involve or affect indebtednees of any kind beyond the limit allowed.

In Prince *vs.* Quincy, 105th Illinois, 138, the city undertook to contract for the construction of water works for a sum which, added to its existing indebtedness, exceeded the constitutional limit of 5 per cent. on its taxable property. It was claimed that a water supply was a necessary requirement of the city, and its provision was an item of ordinary current expense, incident to the city's power of government and administration. While the necessity of the work was admitted, the court held the contract to be void, as beyond the constitutional power of the municipality. The court declared that the rule applied was well settled in Illinois and admitted of no exception, citing several decisions in support of its conclusion.

In Sacket *vs.* New Albany, 88 Indiana, 473, under a constitutional provision, in all respects similar to that of Louisiana, limiting municipal indebtedness of municipal corporations to 2 per cent. upon its taxable property, recovery for the price of a system of fire alarm, the necessity and importance of which is readily seen, was denied on the ground

that the contract, if permitted to stand, would create an indebtedness exceeding the limit. As in the case just cited, it was there contended that the contract should be upheld on the ground of the absolute requirement of a system of fire alarm for the protection of property; but this was found insufficient to sustain the contract, in view of the limitation of indebtedness.

In Valparaiso *vs.* Gardner, 97 Indiana, 1, under a similar provision of the constitution, a like rule was affirmed, although in the particular case the contract in question was held not to be a debt, and hence removed from the limitation of indebtedness.

In National Bank *vs.* Independent District of Marshall, 39th Iowa, 490, the contract of a school board for the construction of a school-house, a purpose directly within the powers of the board and obviously a necessary object for the performance of its duties, was declared void for the reason that its payment would be in excess over and above the indebtedness permitted by the constitution.

In Davis *vs.* Des Moines, 71st Iowa, 501, a local assessment for the construction of a sewer was contested by a property-owner on the ground that its cost would increase the city's debt, in violation of a constitutional provision by which it was limited to a certain amount. It was held that the assessment which was to be paid by the owners of the adjacent property was not a debt of the city, by reason of which it was not affected by the prohibition. On this ground the assessment was upheld, but the rule that all municipal indebtedness in excess of the constitutional limit was void, however necessary the public work for which it was contracted, was null and void, was declared.

This case is instructive in the present controversy. The drainage assessments as levied under the act of 1871 are fully recognized by the constitutional amendment of 1874. In this form they are not affected injuriously by the amendment; but any process by which they are to be converted into

absolute debts of the city is in the teeth of the amendment, by which the city is prohibited from increasing her debt after the 1st of January, 1875, *in any form or in any manner or under any pretext.* In the face of such absolute injunction, the failure of the city to complete the work of drainage and collect the assessments could not make it the debtor of the warrants sued upon. The amendment intended that not one dollar should be added to the city's debt, no matter what the pretense. It would amount to little, if mere neglect or failure of duty could bring about the very result which it was the purpose of the amendment to make impossible.

In Scott *vs.* Davenport, 34th Iowa, 208, the city was expressly authorized by its charter to construct a water-works plant. Here, too, the necessity of a water supply was imperative; yet, notwithstanding the express charter authority and the necessity of the work, the contract was annulled on the ground that it created an excess of indebtedness over and above the constitutional limit.

In Council Bluffs *vs.* Stewart, 51st Iowa, 385, proceedings for the opening of a street, the work to be paid for by an issue of bonds, were set aside on the ground that the bond issue would increase the municipal debt beyond the constitutional limit. The public requirements which necessitated the opening of the street were considered insufficient to remove the contract from the constitutional rule, the court holding that the limitation applied to all debts of every description, for whatsoever purpose contracted.

In the decisions mentioned there are cited many cases upon the question at issue; they are respectfully referred to the consideration of your Honors.

See also Read *vs.* Atlantic City, 49 N. J. L., 558.

In Appeal of City of Erie, 91st Pennsylvania St., 398, a contract for the construction of a market-house, a necessary adjunct of municipal government, was attacked on the ground that its price would add to the city's debt to an ex-

tent that would exceed the limit placed upon it by the constitution. The contract was held void on this ground.

The decisions of the courts of last resort of Illinois, Indiana, Iowa, New Jersey, and Pennsylvania, above cited, are in full accord with the jurisprudence of this Court upon the same subject.

In Buchanan *vs.* Litchfield, 102d U. S., 278, bonds were issued in payment for the erection of water works; the bond issue with the existing municipal indebtedness exceeded the constitutional limit of 5 per cent. upon the taxable property of the city. Upon this ground the bonds were held void.

In Litchfield *vs.* Ballou, 114th U. S., 190, the contractor who built the water works just mentioned sued to recover the money expended in their construction. The bonds, as is seen, having been decreed invalid upon the same ground, namely, that the contract violated the constitutional limit of indebtedness, the relief sought was denied. The prime necessity of the work in question as a means of supplying the city's inhabitants with water was one of the conditions of the suit, but this in no respect hindered the Court from maintaining the constitutional limitation of indebtedness.

In Doon Township *vs.* Cummings, 142d U. S., 366, bonds in excess of the constitutional limit were issued. They were, however, to be used in retiring previously existing debts which were within the limit, and hence in the result there would have been no increase of debt. This Court held, however, that there would be an undoubted increase in the interval between the issue of the bonds and the taking up of the old debt, and this violation of the Constitution, though temporary, and as the initial step towards paying a lawful debt, could not on that account be excused (page 372); the bonds were declared void.

The two questions certified to this Court are completely answered by Peake *vs.* New Orleans, 139th U. S.

The first, whether the city is estopped to plead her bond

issue of $1,600,000 as a payment of all that she owes to the drainage fund, is disposed of by your Honors' decision in the Peake case. You have held that the bonds were a payment, whether called by that name or not, when they were delivered to the drainage contractor. This payment was made to Van Norden himself, as is apparent from the bill, which shows Van Norden, complainant's assignor, to have been the contractor at the time. Plaintiff's title is no better than Van Norden's; it is affected with all the infirmities of the latter.

The second question—whether the Peake case should govern the present case—should be answered in the affirmative. The so-called purchase warrant sued on here is by the act of 1876, under which the city bought, placed in all respects in the same category as the so-called work warrants. Further, as a matter of fact, purchase warrants, the same as are relied upon in the present case, were sued upon in the Peake case, and necessarily the conclusion of the Court in that case embraced every subject involved in the litigation. That the Peake case included purchase warrants is manifest from the opinion of the circuit court in Peake *vs.* City, 38 Fed. Rep., while an examination of the record of the Peake case, on file in this Court, will show that Peake was joined as co-complainant by a party or parties holding purchase warrants and claiming along with Peake the relief sought.

Respectfully submitted.

BRANCH K. MILLER,
Attorney for Defendant in Error.

Court, U. S.
MAR 22 1897
JAMES H. MCKINNEY, CLERK.

167-467

Supreme Court of the United States.

JOHN D. WARNER,
Appellant,
vs.
THE CITY OF NEW ORLEANS,
Appellee.

282

Complainant filed his Bill of Complaint in the Circuit Court of the United States for the Eastern District of Louisiana, to which defendant filed a general demurrer.

The Circuit Court rendered judgment sustaining the demurrer, and complainant appealed to the Circuit Court of Appeals, Fifth Circuit.

The Circuit Court of Appeals certifies to this Court two questions arising on the demurrer, and with the certificate sends to this Court a copy of the printed record in the Court below and copies of Acts of the Legislature of Louisiana applicable to the case, and copies of the briefs on file in the Court below.

The bill sets out certain legislation of the State of Louisiana for the drainage of the city of New Orleans and adjacent districts, and also certain legislation authorizing the city of New Orleans to purchase certain property appropriate for drainage work, and to pay for the same by the issue of warrants drawn by the administrator of accounts on the administrator of finance, and payable out of a drainage fund which the city of New

Orleans had been authorized to levy and collect from the property included in certain districts.

The bill alleges that the complainant is the owner of three of the warrants issued to pay part of the purchase price for such property, and that the defendant was under obligation to collect the same, and that the defendant itself is indebted to the fund, because of assessments levied on its streets and squares. That defendant proposes to set up as a defense payment of its debt to the fund by reason of the issue of certain bonds.

The prayer is for an account; an adjudication that the debt owed by the defendant to the fund is a trust fund for payment of drainage warrants of complainant and others, and that defendant be enjoined from setting up the defense of payment by the issue of said bonds.

The two questions certified appear on page 5 of the record. The two are really but one question, which is: Is the city of New Orleans under the averments of the bill estopped from pleading against complainant the issue of bonds to retire $1,672,105.21 of drainage warrants issued prior to the sale by complainant's assignor of said property to the city, and to be paid for in drainage warrants as a discharge of the city's obligation to account for drainage funds collected on private property and as a discharge for the city's liability to that fund as assessee of the streets and squares?

The second question whether this case is governed by Peake *vs.* City of New Orleans, 139 U. S., p. 342, is involved in the first, and need not be separately discussed.

The Justices of this Court who sat in Peake *vs.* The City, are of course familiar with the legislation of Louisiana and with the facts as they were presented in that

case, and, so far as they are the same, with the facts in this case.

These facts are also quite specifically detailed in the briefs heretofore filed in this case.

Some of the Justices now sitting did not sit in the Peake case, and several of the most important facts in this case did not exist in the Peake case.

The Peake case was heard on pleadings and proofs, and differing views were entertained by the several Justices of this Court as to the evidentiary value of the proofs.

The majority of the Court held that the proofs showed that the city was not derelict in collecting warrants (163 U. S., p. 354). The minority held that the proofs showed that the city deliberately obstructed the collection (p. 368).

In the case at bar the allegation of the bill and the statement certified are that the city "by various means impeded the collection of drainage taxes * * * and encouraged and induced people to refuse to pay the assessments" (Record, p. 3).

The facts of this record therefore agree with the facts inferred from the proofs by the minority of the Justices in the Peake case.

For the above, among other reasons, I therefore deem it appropriate to briefly state the facts presented by the certificate, the Bill of Complaint and the legislation as shown by the copies of laws annexed to the Bill of Complaint.

These acts are printed in a separate pamphlet annexed to the record, and appear in the order of their date.

The first act (March 18, 1858), declared three drainage districts, and directed the organization of three Boards of Commissioners to carry the act into effect.

The Commissioners of the First and Second Districts were *to be appointed by the Mayor of New Orleans with the consent of the Board of Aldermen.* Of the Commissioners of the Third District *two* were to *be appointed by the Mayor of New Orleans* with the consent of the Aldermen and three by other bodies. All Commissioners were to be residents of the several districts. The Boards could sue and be sued. They were authorized to plan and execute drainage work, to assess the property to pay for the same, and the assessment was made a first lien. The amount was not to exceed $350,000 (§ 8).

There was nothing *compulsory* in this act.

It was in the discretion of the board, composed of men resident in the city and appointed by its Mayor, as to what, if anything, should be done (see § 7).

In March, 1859, the next act was passed. It gave the several boards authority to issue bonds having thirty years to run, the amount not to exceed $350,000 for any one district. It provided, further, for the assessment and collection of the cost of the improvements and the application thereof to the payment of interest on and the purchase of the bonds.

March 1st, 1861, another act was passed. This act provided a summary method to collect the assessments by a judicial proceeding and judgment.

These acts are referred to and partly described in the certificate of the Court below, pages 1 and 2.

It will be noticed that under them the Boards of Commissioners were authorized to plan and do the work and assess the cost, but the people who actually did the work were not required to take drainage warrants in payment. The boards did the work in the ordinary way for cash, assessments were levied and collected, and the proceeds were subject to the order of the boards. No warrants were provided for.

The acts above mentioned conclude the first chapter in the history of the drainage legislation for the city of New Orleans.

By act of February 24, 1871 (No. 30), page 9, the State employed the Mississippi and Mexican Gulf Ship Canal Co. to dig the drainage canals, &c., at 50 cents per cubic foot.

The act abolished the Boards of Commissioners provided for by former acts, and directed them to turn over all their property, assessments, &c., to the Board of Administrators of New Orleans.

It directed the Board of Administrators to locate the lines of the canals, &c., and for failure to do so in time the city was made liable to the Ship Canal Co.

The act made it the duty of the City Surveyor to measure and certify the work of the Canal Co., and made it the duty of the Administrator of Accounts to draw a warrant therefor on the Administrator of Finance.

The Administrator of Finance was directed to pay such warrants out of any funds in the city treasury standing to the credit of the Canal Co., and all moneys collected from drainage assessments were directed to be held by the city to the credit of the Canal Co., as a fund to be applied only to drainage and to the payment of the Canal Co., and *ultimately for the benefit of New Orleans*, should the same not be required for the work of drainage. It was made the duty of the city to see that the Canal Co. performed its obligations. The city was also authorized to make assessments at the rate of two mills per foot of land within the drainage districts. The city was also directed to collect the old assessments in time to provide for the warrants to be issued at the date of their issue.

By an act, No. 73, approved April 26, 1872, the city of New Orleans was authorized to issue bonds for

divers purposes, and among them for debts *caused* by receipts of certificates of 1871 (*i. e.*, under act No. 30, of February 24, 1871, last above referred to), and for excavations and levees, drainage machinery, &c. These bonds were to have fifty years to run, and all issued for excavations and levees authorized by said act No. 30, or by drainage laws previously enacted, to be marked "Drainage Series."

It was also provided by said act No. 73 that all taxes collected for drainage, and *not required for the payment of drainage warrants*, should be devoted to the purchase of drainage bonds.

Pursuant to the powers conferred by said act of 1871 the city of New Orleans, by ordinance of February 7, 1872, created the fourth drainage district, embracing lands not embraced in either of the other three districts (p. 8 of Bill, and see copy at p. 27).

Under and pursuant to those acts assessments were levied and judgments thereon rendered in each of the drainage districts, and much work was done by the Ship Canal Co. and more by its transferee, Van Norden. (Bill, p. 9; Record, p. 2). Van Norden excavated some 5,000,000 cubic yards and completed two-thirds of the plan of drainage (Record, p. 2).

Sixteen hundred and seventy-two thousand one hundred and five $\frac{91}{100}$ dollars of warrants issued prior to December 31, 1874, had been paid or taken up by the issue of bonds of the drainage series under the acts of 1871–2. Two hundred and twenty-nine thousand nine hundred and twenty-two $\frac{89}{100}$ dollars had been collected from private property, and nothing had been collected from or paid by the city for the assessments against streets and squares. There were thus uncollected assessments amounting to fourteen hundred and sixty-nine thousand seven hundred and fourteen $\frac{47}{100}$ dollars, of which six hundred and ninety-six thousand

three hundred and ninety-four $\frac{30}{100}$ were against the city, being assessed on streets and squares. The two above-mentioned acts and the above-mentioned ordinance of the city and the above-mentioned acts and events, under and pursuant thereto, conclude what may be called the second chapter in the history of the drainage legislation and of drainage of the city of New Orleans.

Under these conditions the Legislature passed Act No. 16, approved Feb'y 24, 1876, p. 15, of copies of acts annexed to the record.

This act authorized the Common Council of the City of New Orleans to contract with the Canal Co., *and its transferee*, for the purchase and settlement of all rights, &c., of the Canal Co., *or its transferee*, under Act 30 of 1871, and also for the purchase and transfer to the city of all tools, &c., belonging to said Canal Co., *or its transferee*, and used in the drainage work.

The value of the rights and property to be purchased was to be appraised by appraisers to be appointed by the city.

All amounts to be paid were to be paid in drainage warrants, issued in the same form and manner as those issued under the Act 30 of 1871.

"They" (the warrants) "shall be made payable out of the drainage assessments and shall be issued as soon as any agreement shall have been completed."

Pursuant to this act the city caused the property to be appraised and on the appraisal, the Canal Co. and Van Norden, its transferee, executed an act of sale and transfer to the city, and the city issued and delivered to Van Norden drainage warrants for three hundred thousand dollars, the appraised value, and the city covenanted not to obstruct or impede, but to facilitate the collection of drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed that the collection of drain-

age tax assessments should not be *diverted* from the liquidation of said warrants and expenses *under any pretext whatsoever* until the full and final payment of the same (Record, p. 3).

The city now proposes to set up *in effect* that these drainage assessments *have been diverted* to the payment or security of the bonds issued by the city under the Act of 1872, and that thereby the city had paid its assessments, and also the assessments of private persons, and that there is and at the time of the issue of these warrants there was no fund out of which they could be paid.

POINTS.

First.—The question of jurisdiction suggested by defendant is not even plausible.

The contract of sale to the city of the property used in the drainage work was made by Van Norden, and the property sold belonged to him.

This is apparent on the face of the contract, pp. 126-127 of Record in Court below—also pp. 135 to 140 of same—being transfers in 1872, to Van Norden, first, of the rights of the Canal Co. under the Act of 1871, No. 73, as security for advances; and, second, absolutely of the property later, and in 1876 sold to the city.

The warrants sued on were issued to Van Norden, p. 141, and Van Norden, who assigns to complainant was at the time and now is a citizen of the State of New York, and Van Norden also did the work done up to the time of sale (Record, p. 2).

Van Norden's claim therefore was and is on a contract made *by him* with the city and Van Norden could have sued in the Federal Courts.

Second.—The first question propounded by the Court below is divided into two and may be considered separately.

The first question is: "Is the city * * * estopped from pleading the issue of bonds to retire $1,672,105.21 of drainage warrants issued prior to the sale as a discharge of her obligation to account for drainage funds collected on private property?" (Record, p. 5.)

The second question is: "Is the city so estopped to plead such issue of bonds as a discharge from her own liability as assessee of the streets and squares?"

We will consider the latter first.

(*a.*) Right at the commencement we desire to call the attention of the Court to the amazing character of defendant's claim.

At the time when this sale to the city was consummated all the assessments authorized by the various laws *had been levied* and these *assessments* amounted to $1,699,637.37, of which $696,394.30 were assessed against the city (Record, p. 2, and Bill of Complaint, pp. 12 and 13, Paragraph 11). Of this assessment $229,922.89 only had been collected (p. 3). No provision had been made for any further assessment.

The result is that out of those uncollected assessments the purchase money for the property in 1876 sold by Van Norden to the city was to be paid.

The defendant now claims that the fund, *i. e.*, the uncollected assessments, out of which the drainage warrants which complainant's assignor, Van Norden, took in exchange for his property, were to be paid and against which they were drawn, did not at the time of such sale exist, and that the assessments had then all been paid by the theretofore issue of bonds by the city pursuant to the terms of said several acts.

In other words, the city claims that it got this prop-

erty for nothing; that the giving of drainage warrants was a meaningless farce; that they were drawn on a fund which did not exist and never could exist, having already been disposed of.

Now that this was the understanding of Van Norden when he delivered his property, or of the city when it appraised and purchased Van Norden's property, or of the State when it enacted Act No. 16 of 1876 is surely in respect to either of said parties not a thinkable proposition.

To impute such an understanding to Van Norden would make him an idiot.

To impute it either to the city or to the State as held in their reserved consciousness would be to impute to them a gross fraud.

The claim right on its face must be instantly rejected.

Imperative as is the inference that the city at the time of this purchase did not understand or claim that these assessments had been discharged we are not left to inference.

The record states "That the city had never claimed prior to the purchase of said property and franchise that the issuance of said bonds operated as a discharge and made no such plea save in the case of Peake *vs.* The City, filed March 19, *1888*, fourteen years after the bonds were issued, and that neither at the time of sale or of delivery of the warrants did the city disclose to Van Norden that she would claim that by the issue of bonds she was discharged from the assessment against her, and that Van Norden was ignorant that the city would make any such claim and *would not have made the sale if he had known it* (Record p.-4-5.

On the contrary the city recognized and asserted the existence of the drainage assessments as applicable to the payment of drainage warrants and agreed not to ob-

sruct but to facilitate their collection (Record below, or bill, p. 24–5).

(*b.*) *Assuming* that up to the time of this contract the city had the right to claim that the issue of bonds had paid the assessments as against warrants issued before this contract and under another law, the city had no such right as to warrants issued pursuant to this contract and under the law which authorized the city to make this contract.

By her contract agreeing not to obstruct but to facilitate the collection of the assessments ; by drawing her warrant against the drainage fund ; the city asserted the existence of the fund ; asserted that the warrants were collectible, at least so far as the city was concerned, and surely is now estopped to claim that at that very moment when the assignor of complainant parted with his property to the city in consideration of an assignment of that fund or a portion of it, the fund did not exist because of prior action by the city appropriating the whole of it.

Examine for a moment what the transaction in its essence was.

The city purchased and received certain property. The city gave for that property a right to the proceeds of certain assessments part of which were against the city herself.

In other words the city sold a claim against herself.

Now having obtained the property she says that there was no claim against her ; that she had long ago paid the claim she sold us.

Her doing so is in the very teeth of her covenant that she would not obstruct but would facilitate the collection of these assessments.

It must be remembered that upon the city herself devolved the collection and appropriation of these assessments.

Under the act of 1871 all collections then made were turned over to the city—all duty to collect was devolved on the city and the city was required to make and collect an additional tax of two mills on each superficial foot of land within the drainage district where no tax had been levied for drainage purposes.

Is it possible that under any system of jurisprudence the city will be allowed after selling interests in the fund so assessed and to be collected in exchange for property appraised by herself at $300,000 to say that there is no fund—that there was then no fund ; that she had already paid all the seassessments, and applied the proceeds to purposes other than the payment of these warrants ?

(*c.*) The law of Louisiana at least estops the city of New Orleans from any such claim.

In the recent decision of this Court in Richards *vs.* Meyer, 163 U. S., 385, the law was elaborately investigated and clearly stated The thing sold was what purported to be Louisiana bonds.

They were undistinguishable from other similar State bonds but had been appropriated to the seminary fund —had been declared void by the Constitution and a statutory obligation been substituted for them, and this Court held that the bonds were void.

The bonds were then feloniously sold and issued by the State Treasurer and the proceeds used by him.

This Court held that the vendor impliedly under Louisiana law warranted that the bonds were valid bonds.

This case like that is a Louisiana contract—to be performed in Louisiana.

This case like that is a sale of a credit or an incorporeal right ; in this case of an interest in an assessment levied and payable ; in that case of a State bond or obligation.

Both cases are provided for by the express terms of the Louisiana Code quoted on p. 398 of 163, U. S. Reports.

"He who sells a credit or an incorporeal right *warrants its existence* at the time of the transfer though no warranty be mentioned in the deed" (C. C., 2646).

In this case the city sold this interest in these assessments evidenced by the drainage warrant for the property conveyed to the city by complainant's assignor Van Norden.

In that case the defendant sold to the plaintiff an obligation of the State evidenced by the bond.

In this case if the city's contention be sound the assessments assigned did not exist.

In that case the obligation of the State did not exist notwithstanding the evidence of the bond.

In this case far more than in that should the city be held liable on her warranty of the existence of the credit or incorporeal right for on her own contention, the *City herself* had already destroyed the existence of the very credit or incorporeal right which she then assumed to sell and for which she was paid.

Can such a fraud be permitted and especially under a system of jurisprudence whose maxim is *caveat venditor* and not *caveat emptor*?

As to assessments against private property the case if possible is stronger.

The case, bill and certificate show that large amounts of these assessments are uncollected; that the City in purchasing the property from plaintiff's assignor covenanted not to obstruct or impede, but on the contrary to facilitate the collection of drainage assessments; that after getting the property from plaintiff's assignor the City by various means impeded the col-

lection of drainage taxes and encouraged and induced people to refuse to pay the assessments (Record, p. 3).

By what possible course of reasoning can it be claimed that the issue of bonds by the City relieved private property from the assessments when the act under which the bonds were issued provided that "all taxes collected for drainage *and not required for the payment of drainage warrants* should be devoted to the purchase from the lowest bidder of bonds issued for drainage" (p. 15, Sec. 3).

In the Peake case, there is no suggestion by the Court that this issue of bonds relieved the City from the obligation to collect the assessments on private property or that the issue of bonds was in any degree relevant to the controversy in that case so far as assessments on private property were concerned. The controversy in that case as to private property turned on two points:

1. That the City was an involuntary or non-contractual trustee, and that its duties were statutory merely "a failure to discharge which puts less strain on the moral sense" (163 U. S., p. 351).

2. That the conditions were such that to collect the assessments against private property would cost more than they were worth (163 U. S., p. 354).

Neither of those points exist in this case.

It is true that in the Peake case, the contract was made by the State, though for the benefit of the City and the burden thereof was by the State cast on the City.

In the present case, however, the law under which the City acted and bought this property and issued these warrants therefor was permissive only.

It *authorized* the City to purchase; it did not direct or command.

The City's act as to these warrants was, therefore, not statutory or involuntary. Its action or inaction was purely that of the City itself as a municipal corporation.

It is also true, that in the Peake case, the Court held that the City had done all that under the circumstances was incumbent on her to collect the assessments on private property.

In the present case it appears affirmatively not only that the City has done nothing to collect such assessments but that she has done her level best to prevent such collection.

Can even an involuntary, much less a voluntary, trustee act affirmatively against the interest of its *cestui que trust*, be guilty of affirmative waste and destruction and for that very reason, escape obligation?

Third.—The questions of the Court below should be answered; the first in the affirmative and the second in the negative; and the whole record being before this Court the case should be remanded to the Circuit Court of Appeals, with direction that the Circuit Court of Appeals reverse the decree of the Circuit Court overruling the demurrer and dismissing the bill with direction that said Circuit Court enter a decree overruling the demurrer and in accord with the prayer of the complaint.

WHEELER H. PECKHAM,
Of Counsel for Complainant.

167-467

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167-467

United States Supreme Court.

JOHN G. WARNER

vs.

CITY OF NEW ORLEANS.

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Counsel for defendant in his brief filed after argument by permission of the Court in support of his argument as to jurisdiction, says, that Van Norden, plaintiff's assignor, "was dealt with as an individual "only as concerned the dredge boats, &c., which he "purchased from the Canal Company in November, "1872, while his status as transferee of the franchises "and privileges, including the right to drainage taxes "resulting from the assignment in May, 1872, is "preserved; *the right asserted here is one which he* "*acquired by the assignment of May*, 1872."

The learned counsel is wholly mistaken.

The right which *he says* "is asserted here" was in 1876, together with the dredge boats, &c., assigned and transferred *to the City of New Orleans* and *now belongs to that city*, and the right which *is* asserted here is the contract and promise of the City made in 1876, in consideration of that assignment to the City, and made pursuant to Act No. 16, passed in 1876.

The promise in that contract and in the warrants was made by the City directly to Van Norden and in consideration of the assignments made by Van Nor-

den to the City, the Canal Company joining merely to ratify and for greater caution.

The record in this case consists of—

1. The transcript proper, containing a statement of the questions certified.

2. A copy of certain Louisiana statutes sent to this Court by the Court below.

3. A transcript of the whole record below, consisting of the complaint with a great lot of exhibits and the demurrer to the complaint.

4. Some briefs used below.

This record shows that in 1871 the Legislature passed Act No. 30, page 9 of Acts. This act made a contract with the Canal Company to dig drainage canals, &c., and imposed certain duties upon officers and boards of the City to carry out the contract.

In May, 1872, the Canal Company borrowed of Van Norden $150,000, and to secure its payment pledged its rights and the money to come to it under said Act No. 30 of 1871.

The instrument of this transfer is found on pages 135 to 137 of the transcript of the whole record.

In November, 1872, the Canal Company sold to Van Norden certain dredge boats, &c.

The instrument of transfer is found on pages 138 to 140 of transcript of whole record.

Van Norden thus owned the dredge boats, &c., absolutely, and owned all other rights granted to the Canal Company by the Legislature by Act No. 30 of 1871 as security for payment of advances made by him to the Canal Company.

This condition continued until 1876, when the Legislature passed Act No. 16, page 15 of Acts.

This act authorized the *City of New Orleans* to purchase from the Canal Company and its trans-

feree "all or any rights, franchises and privileges created, authorized or arising in favor of said company or said transferee under and by virtue of Act No. 30 of Acts of 1871," and also to purchase "all tools, implements, machines, boats and apparatus belonging to said company or its transferee," &c.

The act further provided that, should such purchase be made by the City, it should be paid for by drainage warrants, to be issued in the same *form* and *manner* as those theretofore issued to the transferee of the said company under Act No. 30 of Acts of 1871 for work done.

That should the City determine to buy, it should appoint appraisers to appraise the value.

That when the sale should be completed and the warrants issued, the "City of New Orleans, through its officers, shall have *exclusive control of all the rights, powers and franchises granted by Act No. 30 of the Acts of* 1871," &c.

Pursuant to this power, the City of New Orleans elected to purchase, appointed appraisers (transcript of whole record, p. 134) received his report (do., pp. 117 to 125), authorized its Mayor to make contract of purchase (p. 134) and made the contract of purchase, and issued the warrants in payment therefor shown on pages 125 to 133.

On page 126 the Canal Company transfers to the City of New Orleans all its rights under Act No. 30 of 1871.

On page 127 Van Norden transfers the boats, &c.

On page 128 the Canal Company and Van Norden SUBROGATE THE CITY OF NEW ORLEANS to all the rights and remedies to which they may be entitled under Act 30 of 1871, and on page 129 the Canal Company agrees that the whole consideration shall be paid to Van Norden, and the City does thereupon pay the whole consideration to Van Norden, *i. e.*, $300,000 in drainage warrants.

On page 130 the City covenants for the continuance of the rights under the laws of the holders of drainage warrants, and "that the drainage tax and

assessment shall be *administered, collected* and paid" in the manner specified.

We submit that it is therefore clear that the rights we are asserting here are those acquired by Van Norden under the contract made with the City of New Orleans and the warrants issued thereunder in 1876, and that the rights acquired by Van Norden under the contract of May, 1872, are not being "asserted here," but, on the contrary, were in 1876 assigned to and are now vested in the City of New Orleans.

As Van Norden is a citizen of New York (Record, p. 1), he could have sued in United States courts, and Warner, his assignee, can sue, and United States courts have jurisdiction.

Superior Court *vs.* Ripley, 138 U. S., p. 93.

Counsel for defendant next claims that the Constitutional Amendment of 1875, prohibiting an increase of debt, is a defense.

It is found on page 22 of the copy acts. There are two answers to the claim:

1. There is no debt or increase of debt here in question.

Under laws prior to 1871, and under Act No. 30 of 1871, certain assessments were levied, part of them against the City of New Orleans as owner *pro hac vice* of the streets and squares.

These assessments are not debts; but their antithesis.

The government, whether National, State or municipal, can raise money in but two ways:

a. By taxation.

b. By loans.

What was done in this case was by taxation, *i. e.*, assessments—one form of taxation.

An improvement was contemplated and initiated.

A tax or assessment was levied to pay for it.

That is not what is prohibited by the constitutional amendment.

On the contrary, that is what is or may be required in order to pay for the improvement.

Borrowing was prohibited—not to prevent improvement, but so as to require costly improvements to be paid for out *of taxation* or not to be made.

All these various acts *levied the assessments.*

The contract and warrants of 1876 merely effected a transfer of the right to the fund produced by these assessments.

They incurred no debt. They assessed and levied the amount then and there.

If, however, the assessment after levy could by misuse of terms be called a debt, such debt had been incurred years before the constitutional amendment. The debt was the assessment as levied and became a debt when levied. It, the fund, whether collected or in process of collection, could be used as and when the officers or the City chose, and by the Act of 1876 the City could use it, and did use it, to pay for the property, it was by that act authorized to purchase.

Again, this question is not raised in the record. The amount of the debt of the City January 1, 1875, does not appear—nor whether this $300,000 would make the debt larger than January 1, 1875.

Counsel further insists that the bonds issued under the Act No. 73 of 1872, page 13 of Acts, *paid* the full assessment against the City as owner of the streets and squares.

It is true that this Court in the Peake case, 139 U. S., held that bonds issued under that act should be applied as payment on such assessment as against the warrants in that case issued *for work done.*

It is true also that in that case some one filed an intervening petition alleging ownership of some warrants issued under the Act of 1876 for this purchase.

The petitioner, however, alleged that his warrants stood on the *same footing* as the others, and raised none of the points we now raise, and none of them

were considered by, or so far as we can learn, mentioned to the Court. He simply asked to share the fate of complainant Peake, and did so.

In the Peake case no question of warranty under Louisiana law was raised or considered.

Neither Court or counsel claimed that the bonds were issued or intended by the City as a payment of the assessments.

This Court, however, held that *in the proceedings* taken to charge the City for delinquency there was an equity that these bonds should be credited on the assessments; the City being under Act No. 30 of Laws of 1871 a "non-contractual trustee."

In this case, however, the facts are wholly different.

The bonds issued under Act 73 of Laws of 1872 were to be purchased from taxes collected for drainage *only when not required for payment of drainage warrants.*

The bonds had all been issued in 1872, or at least before 1874 (Record, p. 3).

In this condition of assessments to the total amount of $1,699,637.37 levied and unpaid · of bonds under Act 1873 to the amount of $1,672,105.21, issued and outstanding, the Act No. 16 of 1876 was passed and thereunder the contract for purchase by the City made.

Now here was new fresh value given to the City. The City has received the property and sold some of it and suffered the rest to become rotten and valueless (Record, p. 3).

Is it not a necessary construction of these acts that in passing Act No. 16 of 1876, the Legislature did not understand or intend that the bonds issued under Act 73 had paid the assessments?

Is it not a necessary construction of the contract of purchase made by the City and the issue by the City of the drainage warrants in form similar to those issued under Act No. 30 of 1871, in which contract the City covenanted "that the drainage tax and assessment shall be *administered, collected*

and paid," as therein provided (transcript of whole record, pp. 130, 131, 132, 133), that the City did not understand or intend that the assessments had been paid by the bonds issued?

Is it not a necessary construction of that contract when Van Orden transferred, to the City, property valued by its own appraiser at $300,000 in exchange for these warrants on the assessment fund, that he did not understand, and that the City did not suppose that he understood, that the assessments had all been paid by the issue of the bonds, and that the warrants given to him were nothing but waste paper drawn on a fund or against assessments which, because of being paid, had ceased to exist?

This act of 1876—this contract made pursuant thereto—were made when *all* knew *all* the facts.

Can we impute to all of these—Legislature, City, Van Norden—the silly or fraudulent performance of which the claim now made by the City would make them guilty?

Is it not clear that as to all these warrants for $300,000 given by the City for property delivered to it—some of it sold by the City—the Legislature, the City and the vendor understood and intended that the assessments levied to the amount of $1,699,637.37 still remained unpaid and subject to these warrants, except $229,922.89, which had been paid by private parties? (Record, pp. 2 and 3.)

And if that was the understanding and intent of *Legislature, City* and *Van Norden* it is *law.*

WHEELER H. PECKHAM,
Of Counsel for Complainant.

167-467

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 364.

JOHN G. WARNER

versus

THE CITY OF NEW ORLEANS.

RICHARD DEGRAY,
ROUSE & GRANT,
Solicitors for Complainant.

L. GRAHAM & SON, LTD., 44-46 BARONNE ST., NEW ORLEANS.

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 364.

JOHN G. WARNER

versus

THE CITY OF NEW ORLEANS.

STATEMENT OF THE CASE.

In the year 1858 the Legislature of the State of Louisiana, by act approved on the 18th day of March, undertook to provide for reclaiming and draining certain portions of the parishes of Orleans and Jefferson, which was divided into three draining districts, each of whose limits are described in said act, and which, together, embraced the territory lying between the Mississippi river in front, the shores of Lake Pontchartrain in the rear, the Jefferson and Lake Pontchartrain railroad on the upper side and Lafayette avenue on the lower side, to which at a later date another drainage district was added, which will be noticed hereafter.

The manner in which this draining and reclaiming was to be accomplished was through the instrumentality of boards of drainage commissioners to be appointed for each district, whose duties were defined in the act, but no plan of drainage was in any manner prescribed in said act, but all was left to the judgment of said commissioners, who were invested with all the rights and powers necessary to drain said districts, to enter the lands, to place thereon the necessary machinery, to dig canals and make levees and embankments.

The manner in which the funds to pay for the work to be done was to be raised was as follows:

Whenever either of said board of commissioners was prepared to drain their district they were to cause a plan thereof to be made, designating its limits, subdivisions, the names of the proprietors of the lands, the dimensions and directions of the canals to be dug, and the place where the steam engines were to be placed.

This plan was to be deposited in the office of the Recorder of Mortgages, and notices were to be published in certain newspapers announcing that said boards would proceed to drain its section, describing the place where the plan thereof was deposited, defining the limits thereof, and indicating as near as possible the time within which the drainage would be accomplished, and its probable cost. After the publication of this notice at least once a week for four successive weeks, said commissioners were to apply to a court described in the act, which was directed, upon proof of said publications having been made, to decree that said district was subject to a first mortgage lien and privilege in favor of said commissioners, for such an amount as might be assessed upon such property for its proportion of the cost of draining such section or district, with interest at 6 per cent. per annum from demand, which lien, privilege and mortgage it was declared should take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, and should attach to the said property until the amount assessed and interest thereon should be paid in full.

Thereafter said boards of commissioners were authorized to levy such uniform assessment on the superficial square foot of the lands in said districts to defray the expenses of the work as might be applicable to each particular district, and on non-payment of these assessments judgment was rendered in any court of competent jurisdiction.

In the month of the following year another act was passed authorizing the issue of bonds, privileged and interest to be secured by said assessments, to raise ready money for the completion of the drainage work.

In the year 1861 another act was passed to provide for the summary collection of the above assessments, as follows: As soon as any assessment roll had been made and notice thereof given, a copy thereof was to be filed in a court designated in said act, and on the tableau of assessment thus to be filed, the property assessed was to be set forth with the amount assessed and the names of the owners thereof, if known, and if not known the fact was to be stated; that a petition was to be filed with said tableau of assessment in certain courts therein named praying for an order on all whom it might concern to show cause within thirty days from the first publication thereof, in certain newspapers, why said assessment roll should not be approved and homologated, and that after said publications said courts should, on motion, approve and homologate said rolls, which should be a judgment against the property assessed and the owners thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings.

Under these provisions commissioners were appointed and qualified in the first and second drainage districts—the latter district being partly in the parish of Orleans and partly in the parish of Jefferson—and they procured the judgments of court declaring the lands in said districts to be subject to said first mortgage lien and privilege (pp. 30 and 31; 58, 59 and 60; 70 and 71).

They also passed resolutions levying assessments in said first and second districts—the former of $3\frac{1}{10}$ mills per superficial foot, and in the latter, 2 mills per superficial foot, payable in ten annual instalments (pp. 143 and 144). Assessment rolls thereunder were made and homologated in said first district for the first instalment thereof in the year 1863 (pp. 32 and 33), and like assessment rolls were made and judgments rendered homologating them for that portion of the second district lying in the parish of Jefferson on the 7th day of December, 1868, and for that portion lying in the parish of Orleans on the 16th November, 1868 (p. 71).

Under the above judgments of homologation some money was collected, and some drainage work was done by said com-

missioners up to 1871, when another act was passed, entitled "An act to provide for the drainage of New Orleans," being No. 30 of that year, which authorized the Mississippi & Mexican Gulf Ship Canal Company to excavate drainage canals and build protection levees under certain terms and conditions therein expressed. By this act the boards of drainage commissioners were abolished, and the board of administrators of New Orleans was made the successor, and subrogated to all the rights, powers and facilities of said commissioners, and to whom were transferred all moneys, assessments and claims for drainage, all books, plans, tableaus, judgments, office furniture, and in fact all property held by said commissioners; and said board of administrators were directed to collect all of said outstanding assessments and judgments, and to make assessments of 2 mills per superficial foot on all parts of said three drainage districts and on such other lands as might be brought within the limits of the protection levees contemplated by said act, and to collect said assessments to provide means for the payment of the work to be done by said canal company, and place the same as collected to the credit of said canal company.

This act, unlike the previous act, provided a plan for drainage, as follows:

First, to surround the territory embraced within said drainage districts with immense levees to prevent the water from flooding the same from without, as follows: on the south the levee or bank of the Mississippi river was to be used, on the east an upper protertion levee was to be built; also one on the north on the shores of Lake Pontchartrain, and on the west a lower protection levee was to be built; and, second, the plan for removing the water and drainage from the territory thus protected from overflow was, to dig immediately inside of said protection levees, immense canals leading into another immense canal to be dug immediately inside of said lake shore protection levee, which was to serve as a reservoir canal from which the drainage emptying therein was to be pumped into Lake Pontchartrain by pumps to be built and run by said city of New Orleans, and into said reservoir canal other canals of

large size were to lead parallel with said inside upper and lower protection levees, and at proper distances, and according to the topography of the land, other canals were to be dug at right angles and connecting with and emptying into said reservoir canal inside of said lake shore levee.

The rate of compensation for work to be done by said canal company was fifty cents per cubic yard for canals dug, and fifty cents per cubic yard for levees built; and the manner in which the amount due was to be ascertained and paid was as follows:

At the end of each month the City Surveyor was to measure the work done during said month, certify it to the Administrator of Accounts, whose duty it was, thereupon, to draw a drainage warrant on the Administrator of Finance, whose duty it was to pay the same, in case he had funds to the credit of said canal company, and if not, he was to endorse thereon the date of presentation, after which said warrant was to bear 8 per cent. per annum interest until paid.

Said board of administrators undertook the performance of the duties imposed on them by said act, procured the mortgage and lien to be declared in said Third Drainage District (p. 90), the Fourth Drainage District to be established (p. 24), (which was the territory brought within the limits of said protection levees, and not embraced within said First, Second and Third Drainage Districts), the mortgage declared therein (pp. 106, 107), assessments to be levied in said Third and Fourth Districts (pp. 143, 144), assessment rolls to be prepared for each of said districts, and the same to be approved and homologated by the courts (pp. 91 to 97, and 108 to 115). The whole amount of assessments that came under administration by said board of administrators was $1,699,637.37, of which $790,621.42 was imposed by said boards of commissioners, and $909,915.74 was levied and reduced to judgment by said board of administrators, and of this total assessment $1,003,342.28 was assessed against individuals, and $696,394.30 against the city of New Orleans on the area of her streets and squares (p. 13). Many miles of old canals were widened and deepened, and many miles of new canals were

dug and levees built by said canal company under the administration by said board of administrators, and in doing this work over 5,000,000 cubic yards of earth were handled by said canal company up to June 7, 1875 (p. 14), when said drainage plan was about two-thirds completed, and when said canal company and Warner Van Norden, who had become the transferee of said company and its franchise, and the owner of all its tools and implements and apparatus under transfer dated 22d May, 1872 (pp. 135 to 137), and bill of sale dated 22d November, 1872 (pp. 138 to 140), sold the same pursuant to the provisions of act of the Legislature approved February, 1876, to the city of New Orleans for $300,000 of drainage warrants, payable out of drainage taxes drawn in the same form and manner as those issued under Act 30 of the year 1871 (pp. 125 to 133).

The total amount of assessments collected by said city of New Orleans up to the time of said sale on June 7, 1876, was $229.922.89, and the uncollected assessments on that day were $1,469,714.47 (p. 13).

The drainage warrants that had been issued prior to December 31, 1874, had been paid by the issue and delivery of bonds of the "Drainage Series," provided for by Sec. 13 of Act No. 73 of the year 1872, amounting to $1,672,105.21 (p. 24).

This suit is brought by complainant on three of these purchase warrants of $2000 each, which were payable to the order of said Van Norden, and are by him endorsed, as well as upon an assignment of all his rights and rights of action against the city of New Orleans growing out of said contract of sale, and the action of said city thereunder (pp. 14 and 15, 141, 145 and 146), and it is brought not only for himself, but for all others holding similar obligations who may intervene for their interest herein and contribute to the costs, expenses and counsel fees of the litigation (p. 1), and it calls for an accounting of the administration of said drainage fund by said Board of Administrators of the city of New Orleans, and especially from the time of said sale in June, 1876, when the city of New Orleans became the voluntary and con-

tractural trustee thereof (p. 23), and by covenant in said bill of sale contained, bound and obligated herself "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of said drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto (Van Norden and the city) that collection of drainage assessments shall not be diverted from the liquidation of said warrants and expenses, under any pretext whatsoever, until the full and final payment of the same" (p. 132).

Various acts of maladministration, intentional destruction and waste of said drainage taxes and fund, from the time the city became contractural and voluntary trustee are charged in the bill.

1. That after said purchase and said city became possessed of the franchise and sole right to do all works of drainage, and of the tools and implements wherewith to do said work, and after she in fact had the duty cast upon her to complete the works of drainage to the end that the land might be made valuable and the taxes collectible, she never finished the works, then two-thirds completed, or undertook any others, but sold some of the said dredgeboats, tools and implements, allowed other boats to sink and rot unused, and all the canals dug to fill up and become worthless, and all in violation of the obligation which she owed to said Van Norden to complete said drainage work to the end that the land might be entirely drained and made valuable and the taxes collectible (pp. 16 to 19), and for the violation of which said obligation said Van Norden has made assignment of his right of action to complainant, for the benefit of said complainant and the holders of all of said purchase warrants.

2. That after said transfer said city has done nothing to enforce the collection of said taxes but to keep an office open where a drainage debtor might pay the same if he insisted upon so doing (p. 17).

3. That in fact in April, 1881, the common council of said city adopted an ordinance instructing its mayor to issue, and

in pursuance thereof he did issue and publish his proclamation advising drainage taxpayers not to pay the same (p. 17).

4. That by reason of the abandonment of said works the courts of Louisiana decided in the 34 La. An., pp. 170-178, that drainage taxes could not be collected, inasmuch as the system had been abandoned, where no benefits had been conferred, which has now become the settled jurisprudence of the State on this subject (p. 17).

5. That in 1883 the common council of the city of New Orleans published a report, wherein it pointed out to drainage taxpayers the benefits of the above decision and advised them to bring proceedings in court to have said taxes erased and canceled from the records as an incumbrance on their property, under which advice many proceedings were brought and large amounts of taxes erased and lost to the fund (p. 17), and that when said proceedings were brought, said city, instead of calling witnesses to show the large and substantial benefits conferred, never defended said proceedings or called a witness to show said benefits, but allowed the same to go by default, of which one instance is given whereby the fund lost $11,532 (p. 18).

6. That in other ways and by other means said city has advised against and discouraged the payment of said assessments until the same have now become worthless as providing means for the payment of said amount given for the purchase of the property aforesaid, which said city has never returned or offered to return or provide other means for the payment of said purchase warrants (pp. 18 and 19).

7. That at other times when said city has been sued for amounts due by her for the purchase of land, she has pleaded the drainage taxes due on said land and been allowed the amount thereof, in one instance to the amount of $25,725.96 (p. 19). And finally complainant shows that he is advised defendant will claim a discharge from all liability to account for drainage taxes which she has collected or ought to have collected by the issue and delivery, between May 10, 1872, and December 31, 1874, of bonds of the drainage series, issued pursuant to Act No. 73 of the

year 1872, and he avers that said city had at no time prior to said Act No. 16 of 1876, or prior to said act of sale, asserted any such claim; that said Act 16 of 1876 was an authority for said city to make said purchase and was a legislative recognition that the drainage fund as created by law and as it then stood on the drainage books and records had not been discharged to any extent or in any manner by the issue and delivery of said bonds, and was an appropriation of so much of said taxes as would be necessary to pay said purchase warrants without offset or impairment by the issue and delivery of said bonds; that said contract was entered into in view and in consideration of the provisions of said Act 16 of 1876, and its effects upon the rights and remedies of said Van Norden, and that at the time of said sale and the acceptance of said warrants for said property sold did said city disclose that she would claim that the issue and delivery of said bonds had discharged her from liability to account for and apply drainage taxes—including those due by herself—to the payment of said purchase warrants, but, on the contrary, and in said act of sale bound herself not to obstruct, but, on the contrary, to facilitate the collection thereof, and not to divert the same under any pretext whatever until said warrants were fully paid, and that said Van Norden, who was ignorant that any such claim would be made, would not have made said sale if he had been advised that any such claim would be made by said city, and that said city is estopped in equity and good conscience from pleading or making any such defence herein (pp. 23, 24 and 25).

The prayer is for an accounting of all drainage taxes and property that came under administration by the city of New Orleans—receipts and expenditures—and that an account be taken of all the waste and damage to said fund by the wrongful acts of adminstration of defendant, by the violation of her duties under the various acts of the Legislature pertaining to drainage, and of her duties and obligations imposed under said act of sale of June 7, 1876, and that complainant, and others similarly situated, be paid from the sum to be found due on said accounting, and especially that the

assessments upon said streets and squares be decreed to be a trust fund applicable to the payment of said purchase warrants, and that defendant be decreed estopped from setting up any defence or offset thereto or payment thereof by reason of the issue and delivery of said bonds of said "drainage series" (pp. 25 and 26).

To this bill a general and special demurrer was filed (pp. 218 to 222. The special ground assigned being—

1. That the Circuit Court is without jurisdiction, because complainant acquired title to the warrants sued on by transfer from the Mexican Gulf Ship Canal Company, which corporation could not have sued on the warrants in the Circuit Court, if no transfer had been made, being a citizen of the same State as the city of New Orleans.

2. That the complainant has no cause of action on account of anything alleged in his bill, as has been decided in the case of J. W. Peake against the city of New Orleans.

This demurrer was sustained by the lower court, and the bill dismissed without qualification, with costs, and complainant has appealed from the decision, assigning the following errors (pp. 224 to 227):

1. The Circuit Court erred in maintaining the defendant's demurrer and in dismissing complainant's bill.

2. The Circuit Court should have decided that the city of New Orleans voluntarily entered into the contract of sale passed before Gustave Legardeur, Jr., notary public, on the 7th day of June, 1876, and thereby became liable to pay the drainage warrants given for the purchase price of the property therein and thereby acquired without qualification, at least to the extent of the drainage taxes assessed upon streets and squares for which she was then a debtor in the sum of $696,394.30, and the court erred in deciding otherwise, and dismissing the bill.

3. The act of the Legislature of the State of Louisiana, approved February 24, 1876, was a special designation and appropriation of the drainage taxes as they then stood on the records of the mortgage offices of the parishes of Orleans and Jefferson to the payment of the drainage warrants authorized to be issued in payment of the price of said purchase; and the said contract of sale of June 7, 1876, made pursuant thereto, covenanted and warranted the existence of said drain-

age taxes without impairment as they stood on said date on said records, and the court erred in deciding to the contrary.

4. The defendant claims as a defence to this action, that at the time she entered into said contract and acquired property of the value of $300,000, in exchange for drainage warrants payable out of the drainage fund, she had already discharged her own indebtedness to that fund, as well as all liability for any neglect or failure to collect the taxes due on private property, by the previous issue and delivery of bonds of the drainage series, issued under Act No. 73 of the year 1872, to an amount in excess of the whole drainage assessments applicable to the payment of said purchase warrants. It was error to maintain this defence.

5. The defendant having confessed by his demurrer that it had not at any time prior to entering into said contract of purchase claimed she had been discharged from said indebtedness and liability to the drainage fund by the issuance and delivery of said bonds, and that Warner Van Norden, the vendor, had no knowledge that any such claim existed or would be made as a defence to the payment of the purchase warrants, and would not have made the sale if he had been aware that such pretence would be put forward, the court erred in dismissing the bill.

6. The court erred in not maintaining the estoppel pleaded in this behalf to the bill.

7. The voluntary contract made by defendant to pay the warrants out of drainage funds, which could only be realized by completing the drainage plans or system, or collecting the taxes already assessed, carried with it an implied covenant that if the city failed or neglected to do this that she would pay the same from other sources. The court erred in holding otherwise.

8. It was a fraud on the vendor in said contract of sale for the city of New Orleans to agree to pay the price out of a fund which she knew was wholly inadequate, if her own indebtedness to that fund had already been discharged, and that fact was not disclosed and made fully known to the vendor; and the Circuit Court erred in holding to the contrary.

9. At the time of the sale on the 7th day of June, 1876, the total amount of drainage taxes then outstanding and uncollected was $1,469,714.47, of which $696,394.30 was due by the city of New Orleans, and $773,320.17 by individuals, and at said time the total amount of bonds of the "Drainage Series" previously issued and delivered under Act No. 73 of the year 1872, was $1,672,105.21, or $202,390.74 more than the total amount of drainage taxes at said time outstanding,

and in view of these facts it was error for the court, after the delivery to and acceptance by the defendant of the property purchased, which it has never returned or offered to return, to allow said defendant to set up any claim or offset to said drainage taxes then outstanding on the drainage records, or any of them, to the prejudice of the warrants given for said purchase, such claim being moreover in direct contravention of the covenant contained in said act of sale, not to devote said drainage taxes to any other purpose than the payment of the warrants then outstanding.

10. The court erred in not distinguishing the present suit from the suit of Peake vs. New Orleans, reported in the 139 U. S. R., page 342 and following, and especially in that it did not recognize the fact that the present suit is based on a different obligation, to-wit:. on drainage warrants given for the purchase of the franchise, machinery, tools, dredgeboats, franchise, etc., purchased under and pursuant to special authority of the Legislature of the State of Louisiana granted by an act approved February 24, 1876; and did not further recognize the fact that the present suit is based on an assignment from said Van Norden to complainant of all his rights, and rights of action against said city of New Orleans, set up in the bill and in said assignment filed therewith and marked "Assignment 1;" and farther that it did not recognize the fact that the relation of the city of New Orleans under said act of February 24, 1876, toward the drainage fund was changed from that of compulsory and involuntary trustee to that of voluntary and contractural trustee, and that the duties created by and under said act approved February 24, 1876, were duties and obligations placed directly on the municipality of New Orleans, instead of on the Board of Administrators, as was provided by Act No. 30 of the year 1871.

11. The Circuit Court being of opinion that the bill of complaint could not be maintained because a receiver had been appointed, should have dismissed the bill "without prejudice," and it was error to dismiss the bill without this qualification.

Argument.

I.

Although the bill was dismissed upon the merits without qualification, and not for want of jurisdiction in the Circuit Court, yet as that question is always open for review in the appellate court, and the court will notice defects in juris-

diction *sua sponte*, we will discuss it before going into other questions involved in this case.

It is claimed that this action is based on drainage warrants, acquired by Van Norden through an assignment from the Mexican Gulf Ship Canal Company, which was a citizen of the State of Louisiana, and could not sue the city of New Orleans, to recover the contents of said warrants; and that therefore the Circuit Court is prohibited to exercise jurisdiction over the cause of action, by Sec. 1 of the Act of Congress approved March 3, 1877 (24 Statutes, 552). But it seems to us that a very brief statement of the circumstances under which the warrants were issued will show the fallacy of this claim.

At the date of the contract of sale to the city of New Orleans, June 7, 1876, Warner Van Norden was absolute owner of the dredgeboats, tugs and other personal property used in carrying on the drainage works, and was pledgee of the franchises of the Mexican Gulf Ship Canal Company. So far, therefore, as third persons were concerned, he was at the time practically owner of the franchises also, as he had a right to apply the proceeds of the sale of the franchises to the payment of the debt then due him. In this double capacity, as owner and pledgee, he made the sale in question to the city of New Orleans, the Mexican Gulf Ship Canal Company joining in the act, and making the following stipulation:

"And now comes the said J. Mather, Jr., and said S. D. " Moody, respectively president and secretary of said canal " company, in their respective capacity, and the said W. Van " Norden, as transferee and pledgee aforesaid, and in his own " name, individually, declared that they have covenanted and " agreed, and do by these presents covenant and agree, that " the said sum of $300,000 in drainage warrants shall be paid " in full to the said W. Van Norden, in consideration of the " sales herein made, and also in full settlement of all exist- " ing claims for damages which the said Mississippi and " Mexican Gulf Ship Canal Company, and the said W. Van " Norden as transferee and pledgee aforesaid, and in his own " name, individually, ever had, or have now or may have " against the said city of New Orleans.

" And the said Mississippi and Mexican Gulf Ship Canal

"Company, through it president and secretary aforesaid, "does, moreover, by these presents, fully authorize the said "city of New Orleans to pay the said sum of $300,000 in "drainage warrants to the said Warner Van Norden" (Tr., p. 61).

The purchase warrants were issued accordingly, payable to Van Norden. They were made distinct obligations of the city, in which she agreed to pay the several amounts specified in them, to him or his order. Although part of the consideration of the warrants was nominally represented by the franchises of the canal company, that company never had any title to or right of action on the warrants; nor did it have an action against the city on the contract of sale, for it assented that the whole price of the sale should be paid to Van Norden. In fact, there never was a moment during the whole transaction in which the canal company had any claim against the city that it could enforce by a suit, or assign to any one.

The language of the statute is, "that no Circuit Court shall take cognizance of any suit to recover the contents of any promissory note, or chose in action, in favor of any assignee, unless such suit might haye been prosecuted in such court to recover said contents, if no such assignment or transfer had been made."

The application of the statute has always been confined to suits brought for the recovery of the contents of a chose in action, and has not been extended to any other class of cases. It has always been applied to cases in which the plaintiff has acquired his right of action from former owner of the contract sued on. It must appear that the plaintiff sues by virtue of a title derived from a person disqualified to sue on the contract in a Circuit Court of the United States. The material question here, then, is, what title to the warrants, or right of action thereon, has ever vested in the canal company, which it could transfer to any one? The warrants were made payable to Van Norden, who was both the technical payee and the beneficial owner, and he being a citizen of the State of New York, could have prosecuted his suit in the Circuit Court

to recover their contents. In fact, no other person could bring a suit on the warrants, without first obtaining a transfer from him.

It is true that Van Norden is described in the warrants as transferee. We take it, however, that the "transferee" was used to indicate the source of the consideration, for which the warrants were given, and for the further purpose of connecting them with the sale of the drainage plant and franchises, just as the payee of a note given for rent is generally described in the note as lessor to show its consideration.

The contract of sale being an executed contract, merged the rights of all parties in the warrants, on the same principle that the cause of action is merged in the judgment rendered on it, creating a new debt and extinguishing all antecedent contracts. Thus it was held in *Ober vs. Gallagher, 93 U. S. 193*, that although the holder of a note could not originally have brought a suit on it because of this prohibition, he might sue on the judgment thereon, in the Circuit Court, after obtaining one in a State court.

Says Justice Story in *Bean vs. Smith, 2 Mason, 269:* "It is no objection to the jurisdiction that at some antecedent period the transaction was not within that jurisdiction. It is sufficient if it has become so modified by the act of the parties or by the principles of law that jurisdiction now attaches."

It has never been considered that the owner of property acquired from the person who could not vindicate his rights by suit in the Circuit Court could not himself sue in a Circuit Court to recover the property, or for damages for its unlawful caption, on account of the disability of his grantor. McDonald vs. Smally, 1 Peters, 620; Crawford vs. Neal, 144 U. S. 593; Deshler vs. Dodge, 16 How. 622.

Nor does the prohibition of the statute apply to an action of trespass brought by an assignee of a claim to recover damages for cutting and removing timber from the lands of the assignor, who could not himself sue in the Circuit Court. Ambler vs. Ephinger, 137 U. S. 480.

These cases illustrate the doctrine contended for by us, that the statute applies only to actions upon notes and choses,

where the plaintiff claims title directly from some person who could not sue thereon in the Circuit Court, and not to contracts which may have for their consideration antecedent contracts, which might have been within the prohibition of the statute, but which have been novated by the substitution of a new and independent agreement made in favor of a person competent to sue in the Circuit Court.

FIRST POINT (THIRD ASSIGNMENT OF ERROR).

Act No. 16 of the Legislature of the State of Louisiana, approved February 24, 1876, is a special dedication and appropriation of the drainage taxes as they then stood on the drainage records for the payment of said purchase warrants, and admits of no counter claim or offset.

We start the discussion by recalling the fact that the beneficiary is the city of New Orleans, who purchased, under a special act of the Legislature, the property of another, who did not owe her one cent, and she promised to pay him out of a fund which is not her own, but of which her officers are the trustees, and against which fund, neither at the time of the passage of the act of the Legislature, nor at the time of the sale and delivery of the property, had she ever pretended to have any claim.

This fund—these drainage taxes—were the creation of the Legislature of the State. The same Legislature that created them subsequently declared they should be a fund out of which the warrants given for said purchase should be payable. Clearly, then, this last act of the Legislature was a new destination and appropriation of said taxes to a particular and special purpose, for the benefit and advantage of the corporation of New Orleans, to-wit: to enable her to alone have the power, either through her own officers and employés, or by contract to the lowest bidder, to do all canaling, dredging, ditching or other drainage work, and to furnish and provide her with the necessary tools, implements and machinery with which to do said work.

Such destination and appropriation ranks any prior claim, or pretended claim that said city of New Orleans had or could

have against said drainage taxes, especially when said pretended claim is greater than all the drainage taxes at the time outstanding, and when the application and allowance of said claim would wipe out all of said taxes for her own benefit, and leave the vendor, in whose favor the warrants were drawn, nothing—as we will show hereafter—to pay the obligations given him. This would be a manifest fraud, and one which no court of justice would for a moment allow.

The only intelligent and equitable interpretation, therefore, that can be given to this legislative act is, that it was a new and special destination and appropriation of so much of said drainage taxes, as they stood on the records at the time of the passage of said act—including those against the city herself—as were necessary and most available for the payment of said purchase warrants, and against no part of which could any claim be allowed to the city of New Orleans to the prejudice of the payment of said purchase warrants.

SECOND POINT (FOURTH, FIFTH, SIXTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR).

The defendant is estopped from setting up any offset to the drainage taxes and judgments, as they stood on the drainage records at the date of suid sale, on June 7, 1876, and especially to those due by herself on the streets and other property.

The matter of estoppel set up in the bill is as follows (pp. 23, 24 and 25):

"And your orator is advised and shows to the court that defendant, the city of New Orleans, will set up and plead as a discharge to this suit that she has discharged herself from all liability to account for drainage taxes which she has collected, or ought to have collected, for the benefit of holders of drainage warrants by the issue and delivery, between May 10, 1872, and December 31, 1874, of $1,672,-105.21 of her bonds of the drainage series, issued and delivered pursuant to Sec. 17 of Act No. 73 of the year 1872, or some other act to take up drainage warrants, issued for work done pursuant to Act No. 30 of the year 1871, but your orator avers that the city of New Orleans had not at any time prior to the date of said Act No. 16, approved February 24, 1876, or prior to the execution of said contract of

purchase dated June 7, 1876, made pursuant to said act, asserted or claimed that she had been so discharged, but had at all times acted upon the theory that said bonds were issued in discharge of a fixed liability cast upon her by said Sec. 17 of said Act No. 73 of 1872; and your orator is advised and so charges that said Act No. 16 of 1876 was an authority for the city of New Orleans to purchase said dredgeboats, tools, implements and franchise, and was a legislative recognition that the drainage fund as created by law, and as it then stood on the records of the city of New Orleans, and as recorded in the mortgage office, had not been discharged in any manner or to any extent by the issue and delivery of said bonds, and was an appropriation of so much of said fund as would be necessary to pay said purchase warrants without offset or impairment by reason of the issue and delivery of said bonds of drainage series.

"And your orator avers that said contract of purchase was entered into in view of and in consideration of the provisions of said Act No. 16 of the year 1876, and its effects upon the rights and remedies of said Van Norden; that neither at the time of entering into said contract, nor when said warrants were delivered in discharge of the price of sale, did defendant disclose to said Van Norden that she would claim that the issuance and delivery of said bonds had discharged her of liability to account for and apply drainage taxes and funds, including those due by herself, to the payment of the warrants issued to him, but on the contrary, in and by said contract of sale, and the covenants therein contained, recognized and asserted the existence of said drainage taxes as applicable to the payment of said warrants, and agreed 'not to obstruct or impede, but on the contrary, to facilitate by all lawful means, the collection of drainage assessments as provided by law, until said warrants have been fully paid, it being well understood and agreed between the said parties hereto that the collection of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expenses as herein provided for, under any pretext whatever, until the full and final payment of the same,' and the said Van Norden, who was ignorant that said city claimed, or would claim a discharge from liability on account of the issuance and delivery of said bonds of said drainage series, would not have entered into said contract if he had been advised that any such claim would be made as defence herein, and so your orator is advised and avers that the defendant is now estopped, in equity and good conscience, from pleading or maintaining said defence."

And right here we desire to call the court's attention to the amount of bonds of the "drainage series" issued and delivered prior to the time of the purchase by the city from Van Norden on May 7, 1876, and the amount of drainage taxes *then* uncollected, against which the drainage warrants given for said purchase were drawn. The 11th paragraph of the bill, page 13, shows the uncollected drainage taxes as they stood at said time on the drainage records, including the taxes assessed against the city of New Orleans, were $1,469,-714.47, while the amount of bonds of the "drainage series" issued long prior to said time, to take up drainage warrants given for drainage work done, was $1,672,105.21 (page 24), leaving the drainage tax account then indebted to the bond account in the sum of $202,390.74.

Surely it can not be seriously contended that Van Norden would part with this large and valuable amount of property, had he for a moment believed, or had even a suspicion that the city had a prior outssanding claim against said drainage taxes for more than two hundred thousand dollars greater than the total thereof, leaving him absolutely nothing to pay the warrants given him for the property he delivered to the city.

And this ignorance of Van Norden of any claim or offset on the part of New Orleans is established not only by the averments of the bill—which the demurrer admits—but is justified by the action of the Legislature, by the acts of the city, independent of any averment in said bill, and *first*, as to the acts of the Legislature.

On the 24th day of February, 1874, the Legislature of the State passed a joint resolution submitting an amendment to the Constitution of the State, limiting the debt of the city of New Orleans, in which there was a proviso which declared said amendment was to be so construed as not "to prevent the issue of drainage warrants to the transferee of the contract under Act No. 30 of 1871, payable only from drainage taxes, but not otherwise."

This amendment was submitted to a vote of the people, and was duly adopted, and became a part of the organic law

of the State, going into effect on the 1st day of January, 1875, It stopped the further issue of bonds of the "drainage series," provided for under Act No. 73 of the year 1872, and yet declared said amendment was not to be construed so as to prevent the issue of drainage warrants payable out of drainage taxes, but not otherwise. The very allowance of the issuance of drainage warrants payable out of drainage taxes precludes the idea that there could be any claim against those taxes by the city greater than the entire amount of the taxes themselves.

In other words, the Legislature and the people said Section 13 of the Act No. 73, approved April 26, 1872, is at an end—you shall have no more bonds of the "drainage series"—but you may have drainage warrants payable from drainage taxes, but not otherwise.

And Act No. 16 of the year 1876 is equally clear on this subject. It authorized the city to assume exclusive control of all drainage, to purchase the rights and property of the canal company and Van Norden, its transferee, and to provide for the manner of making said purchase, and for paying therefor "in drainage warrants," and in its third section provided:

"That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued in the said form and manner as those heretofore issued to the transferee of the said company under Act No. 30 of Acts of 1871 for work done. They shall be made payable out of drainage assessments, and shall be issued as soon as any agreement shall have been completed."

In other words, the fund out of which the purchase warrants were to be paid, was the fund as it had been created under Act 30 of 1871, which precludes the idea of any counter claim or offset, and certainly the idea of a counter claim and offset, greater than the entire amount of taxes then outstanding.

Surely all of this legislation meant there were drainage taxes out of which the warrants given for said purchase were to be paid, and it never meant that the bonds of the "drain-

age series" issued under the above section of said Act No. 73 of 1872, long prior to the date of the passage of this joint resolution, prior to its becoming an amendment to the Constitution of the State, prior to the passage of the act authorizing the purchase in pursuance of which the warrants in question were given, and for an amount greater than all the then outstanding drainage taxes, were a claim by the city against said taxes, which primed the payment of said warrants and left them absolutely worthless.

Second—And the belief of Van Norden that there was no such claim is equally clear and convincing, not only from the averments of the bill, but from the exhibits thereto attached, as well as from the decisions of the courts of Louisiana on drainage matters.

(a) Among the exhibits made part of the bill herein are the pleadings in suit No. 10,339 on the docket of the United States Circuit Court for the Eastern District of Louisiana, entitled John Crossley & Sons vs. The City of New Orleans (pp. 162 to 185). In the bill filed in that case the various assessments are set up, and among them, and especially enumerated, are those levied on the area of the streets and squares (p. 171), and in the answer of the city to this bill, filed as late as November, 1884 (p. 173), there is no pretence of any offset or claim against said assessments—those due by the city of New Or eans or due by individuals, by reason of the issue and delivery of said bonds of the "Drainage Series."

(b) The act for the issuance of bonds of the "drainage series," as before noticed, was approved April 26, 1872 (Sec. 13), and the issue of said bonds began almost immediately, the averment in the bill being they were all issued between May 10, 1872, and December 31, 1874 (p. 24), and yet on the 21st of March, 1874 (p. 11, par. 10, and pp. 54, 55 and 56), nearly two years thereafter, a judgment homologating the assessment rolls in the First District, from the second to the tenth instalments, was rendered at the suit of the city of New Orleans herself, including the assessments against said city, based on streets and squares, amounting to $223,111.60, and

there was no pretence of any claim or offset by reason of the issue of said bonds of the "drainage series."

(c) The judgment homologating the assessment roll in the Fourth Drainage District was entered on the 20th day of March, 1873, about a year after the bond issue began, and yet there was in said judgment an item against the city of New Orleans based on the assessments of $65,956.72 (pp. 114 and 115), and no deduction or offset was claimed on account of the issue of said bonds of the "drainage series."

(d) In May, 1875, the Supreme Court of Louisiana (see 27 An., p. 496), by mandamus compelled the officials of the city of New Orleans to collect the drainage taxes in the First, Second, Third and Fourth Drainage Districts. This was several months after the last bond of the "drainage series" had been issued and there was no pretence of any claim against the drainage fund by the city of New Orleans by reason of the issuance and delivery of the bonds of said "drainage series."

Third—The city of New Orleans is estopped by her own covenant contained in the bill of sale of June 7, 1876, under which the series of drainage warrants now sued upon were given, from claiming any offset against the drainage fund by reason of the issuance and delivery of said bonds of the "drainage series.". That was not only a bill of sale of the drainage plant and franchise, but it was also a final settlement of all claims between the parties thereto, the city and Van Norden, the city giving said Van Norden $20,000 in warrants besides those for the purchase, because he claimed there had been a misappropriation of drainage funds—wherein it was expressly stipulated that said drainage assessments were not to be diverted from the liquidation of the warrants therein provided for under any pretext whatever until the full and final payment of the same. Surely, this covenant, besides stipulating against the use of the taxes for any other purpose than paying drainage warrants, negatives any idea that there could be a claim by the city of New Orleans against the drainage taxes greater than the taxes themselves by reason of the issue and delivery of said bonds of said "drainage series."

It is therefore clear that not only from the admitted averments in the bill, but from the exhibits thereto attached and made part hereof; from the legislation of the State; from the jurisprudence of the courts of the State; from the acts of the parties showing the manner in which the drainage accounts were kept, and from the covenants contained in the bill of sale under which the warrants in question were issued, that Van Norden at the time he parted with his property, had no knowledge, intimation or suspicion, or ground for a suspicion, that the city of New Orleans had, or pretended to have, any claim against the fund, out of which he was to be paid. It can not be that the city of New Orleans could purchase Van Norden's property at an appraisement made by an officer of their own selection, ever since hold and possess it, never offer to return it, and when the obligations payable out of a certain fund, and given from said property, are presented for payment from that fund, that she can be allowed to say there is no fund, because that fund is primed by a claim of her own created long before the purchase was made. This position can not be sound either in law or good morals.

The law applicable to the condition of things here disclosed has been frequently announced by the Supreme Court of the United States.

In Morgan vs. Railroad Co., 96 U. S. R. p. 720, the court said:

"The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice, where nothing else could save them from defeat. It proceeds upon the ground that he who has been *silent* as to his alleged rights, when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. Bank of the United States vs. Lee, 13 Pet., 107.

"He is *not* permitted to deny a state of things which, by his culpable silence or misrepresentations, he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it

would be inequitable for the party against whom the doctrine is asserted to take advantage. Merchants' Bank vs. State Bank, 10 Wall., 604."

In the case of Leather Manufacturers' Bank vs. Morgan, 117 U. S. R., pp 108 and 109, this subject is discussed at length, as follows:

"The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In Morgan vs. Railroad Company, 96 U. S. 716, 720, it was held that a party may *not* deny a state of things which, by his culpable silence or misrepresentations, he has lead another to believe existed, if the latter has acted upon that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In Continental Bank vs. Bank of the Commonwealth, 50 N. Y. 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, J., 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. Gaylord vs. Van Loan, 15 Wend. 308.' The general doctrine, with proper limitations, was well expressed in Freeman vs. Cooke, 2 Exch. 654, 663, and in Carr vs. London & Northwestern Railway Compar.y, L. R. 10 C. P. 307. In the first of those cases it was said by Park, B., for the whole court, that 'if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by *negligence or omission*, where there is a duty cast upon a person by usage or trade or otherwise, to disclose the truth, may often have the same effect.' And in the other case, Brett, J., speaking for the court, said: 'If in

the transaction itself, which is in dispute, one has led anotherinto the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second can not be heard afterward, as against the first, to show that the state of facts referred to did not exist.' See also Manufacturers and Traders' Bank vs. Hazard, 30 N. Y. 226, 229; Blair vs. Wait, 69 N. Y. 113, 116; McKenzie vs. British Linen Co., 6 App. Cas. 82, 101; Miles vs. McIlwrith, 8 App. Cas. 120, 133; Cornish vs. Abbington, 4 H. and N. 549, 556."

The court then reviews numerous other cases, and at page 112 sums them up as follows:

"These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that, where a duty is cast upon a person, by the usage of business or otherwise, to disclose the truth—which he has the means by ordinary diligence of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct."

THIRD POINT (THIRD AND SEVENTH ASSIGNMENTS OF ERROR).

There was implied warranty in the act of sale that the amount of drainage taxes, as they stood on the drainage records at the time of said sale, were then due and owing.

And we go even further than the doctrine of estoppel, and contend that, apart from the acts of the Legislature, the amendment to the Constitution of the State limiting the city debt, the covenant of the city of New Orleans as contained in the bill of sale, there was an applied warranty on the part of the city of New Orleans that there were drainage taxes out of which said warrants should be paid, and that there certainly was such an implied warranty as far as any claim that the city of New Orleans might have against said drainage taxes.

And here it must be remembered that the purchaser was

the corporation of the city of New Orleans, and the fund out of which the purchase was to be paid was not the property of that corporation, but property of which the Board of Administrators of the city of New Orleans were the trustees. In other words, the city of New Orleans promised to pay nothing of its own for the property delivered to it, but to pay from property its officers were administering, and against which, neither at the time of the sale or at any time prior thereto, had she pretended to have any claim.

There are, therefore, no claims of an outside third party here involved or set up against the drainage tax assessments, and the question is, whether the giver of the obligation against drainage taxes can, after delivery to, and acceptance by her of the property sold, be heard to say, I have a claim against the drainage taxes in question greater than the sum total thereof, that in fact there are no drainage taxes—that as to those due by herself and assessed on the streets and squares she holds a claim greater than the amount thereof, that there is nothing due thereon—and as to those against individuals she holds a claim in excess of the amount thereof, that in fact there are no drainage taxes at all, because of her counter claim and offset, and as this counter claim and offset arose prior to the time the sale was made and the goods delivered, there are no funds out of which the vendor can be paid, and that the fact that she never, at the time of the sale or at any other time prior thereto, set up such a counter claim does not now prevent her from claiming the advantage of such hitherto unpretended counter claim.

The doctrine of implied warranty is thus treated of in Brandt on Suretyship and Guaranty, Sec. 15, page 19 and following:

"Although a surety or guarantor generally becomes bound by express contract, yet persons are sometimes held as sureties or guarantors who do not so become bound. The law will, under certain circumstances, imply such contract. Thus, where two married women made a promissory note, and the payee endorsed it to A. before maturity, A. at the same time knowing that the makers were married women, it was held that the endorsement of the note to A. was an implied guar-

anty that the makers were competent to contract in the character in which, by the terms of the note, they purported to contract; and the fact that A., when he took the note, knew the makers were married women, did not change the rule. So the vendor of a promissory note, who transfers it by endorsement expressed to be without recourse, impliedly guarantees the genuineness of the signatures of the prior parties, whose names appear on the note. A person not a party to a promissory note, and who does not endorse it, but who sells it and receives the money, by implication guarantees the genuineness of the signatures; and this whether he receives the money paid for the note for himself or for another. The only way he can avoid responsibility is by agreement to the contrary. So the purchaser of goods, who transfers without endorsement the promissory note of a third party, *impliedly guarantees that the sum expressed in the note is due.* A person who procures notes to be discounted at a bank impliedly guarantees the genuineness of the signatures of the makers and endorsers; and such implied contract is not a representation concerning the character, credit or ability of another, within the statute of frauds; and such person may be sued as a guarantor of the notes if the signatures are forged. The reason on which the last preceding cases are grounded is thus well expressed by the court in the case last cited: 'It seems to fall under a general rule of law that in every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it.'"

In the case of Furniss vs. Ferguson, 15 N. Y., 437, there had been an assignment of a judgment and it turned out that a part of said judgment had been paid, but the court held that "in the absence of any statement by the assignor that payments have been made thereon, the law implies a warranty that the whole nominal amount remains due and unpaid." The court, in the discussion of the case, said:

"The doctrine of implied warranty of title applies with no less force to the sale by one person of a judgment recovered in the name of another than to the sale of a mere personal chattel. It is founded on the presumed superior knowledge of the vendor on the subject, and this presumption would certainly be as strong upon the sale of such a judgment, when the evidence of the vendor's title must rest in contract alone, as upon that of a chattel, which is susceptible of a more open

and visible transfer. This warranty, in case of a sale of a judgment, where nothing is said on the subject, must embrace a warranty that the judgment is *due and unpaid*. The vendor is presumed to have the means of knowledge how this is, while the vendee is not supposed to have this knowledge. The vendor is held liable upon an *implied warranty* in such a case, upon a principle precisely analogous to that upon which he is bound to respond, when upon the sale of a chattel he conceals some latent defect.

"The only difference is that in one case the *scienter* must be proved; in the other it is presumed. There is an implied warranty as to quality as well as title, upon every sale of a chattel, when the circumstances are such only as to imply a knowledge by the vendor of the defects in quality; as where a manufacturer sells articles having defects growing out of the process of manufacture. The warranty in such a case rests upon precisely the same principle as the implied warranty of title. Wheresoever the knowledge of a defect not disclosed, whether it be one of title or quality, is presumed, the vendor is liable upon a warranty; and whenever knowledge is proven he is liable for a fraud. It is a warranty in the one case and not a fraud, simply because fraud can not be predicated upon a mere legal presumption.

"It follows that when a judgment for a specific amount is assigned, nothing being said about any payment, and it turns out that payments have been made, whether this be regarded as a defect of title or quality, it is a violation of the *implied warranty*, because the assignor must, of course, in ordinary cases, be presumed to have better means for knowing the facts than the purchaser.

"There may, undoubtedly, be cases to which this presumption would not apply, as when a judgment is transferred to one who has had charge of its collection, under such circumstances as would raise a presumption that he was privy to the payments. But these are exceptions. As a general rule the superior knowledge of the assignor would be presumed, and there is nothing in the present case to repel that presumption."

In the case at bar there could be no presumption that the drainage taxes had been paid, in whole or in part, by the issuance and delivery of bonds of the "drainage series," because, as the bill shows that, prior to said act of sale, the defendant had "at all times acted upon the theory that said bonds were issued in discharge of a fixed liability cast upon her under

Sec. 13 of said Act 73 of 1872, and as we have heretofore seen said defendant never asserted, pretended, or even intimated, that any part of said taxes had been paid, or that she had any claim against said taxes.

And this decision from the 15th N. Y. has a peculiar force on the question under consideration, because the drainage taxes against which the warrants are drawn had been and were, at the time of said sale, judgments against both the parties against whom the assessments were levied, as well as against the land on which they were levied, for Act No 57 of 1861 declared that the "homologation of said assessment rolls should be a judgment against the property assessed and the owner thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings."

FOURTH POINT (TENTH ASSIGNMENT OF ERROR).

The present is an entirely different suit from that of Peake vs. New Orleans, 139 U. S. R., p. 342, etc.

1st. The present suit is based on a different obligation, to-wit, on drainage warrants given for the purchase of property, under a different and a special act of the Legislature authorizing such purchase, and designating and appropriating the fund out of which the purchase price was to be paid.

2d. The present suit is also on an assignment from Van Norden, the vendor, to whom said purchase warrants were given, which placed complainant in possession of all the rights, and rights of action which said Van Norden had or might have under said act of sale of June 7, 1876.

3d. The relation of the city of New Orleans toward the drainage fund since said act of the Legislature approved on the 24th of February, 1876, and the act of purchase made thereunder, changed from that of involuntary and compulsory trustee to that of a voluntary and contractural trustee, and imposed the duties of such trustee.

4th. The duties and obligations under said act of February 24, 1876, and the act of sale passed in pursuance thereof,

were placed directly on the municipality of New Orleans, and not on the Board of Administrators of said city, as under the Act 30 of 1871.

1. By reference to the bill herein it will be seen (pp. 14 and 15) that the warrants which are the basis of this suit were given for the purchase of the property of which Van Norden was owner and the property of which he was transferee, while the warrants which are the basis of the Peake suit, it will be seen by a reference to a copy of the bill in that case, which is made part of the bill in this case (pp. 196 and 197) were based on warrants Nos. 115, 116 and 122, dated July 9, 1875, issued for work and labor done under Act 30 of 1871, and they are therefore controlled by the legislation as it stood prior to February 24, 1876, under which the city purchased from Van Norden and the canal company all their rights and property, with full subrogation, and alone became possessed of the power of drainage, etc., and which act, as we have shown, was a new and special designation, dedication and appropriation of the drainage taxes as they stood at the date of said sale on the drainage records subject to no offset or impairment whatever.

2. This suit is also on an assignment from Van Norden to complainant, which was not in existence when the Peake case was filed in the Circuit Court or heard on appeal in the U. S. Supreme Court. In the Peake case the court held that when the city bought out Van Norden and abandoned the drainage work, no speculative contingent or future liability arose in favor of third parties—that the city having purchased, it had a right to abandon the drainage work, and that the creditors of the contrctor could not charge the city as a debtor on the theory that if the work had been completed their claims would have become of value.

To meet this conclusion complainant procured from the contractor here named the assignment found at pages 145 and 146, which, after reciting that when said Van Norden parted with the warrants for value he believed he had transferred, and intended to transfer, to each subsequent holder thereof all his rights and rights of action that could or did

at any time enure to him as vendor, as well as all rights of action that might accrue in his favor from said act of sale, or the conduct of the city of New Orleans under said act of sale or its violation of duty thereunder by reason of any act of omission or commission that said city may have been guilty of under said act of sale, or that might have accrued in any other manner, assigns, transfers, and sets over, with full subrogation to complainant for himself and other holders of drainage warrants, each, any and all action and rights of action against said city of New Orleans, etc., declaring that the purpose of said assignment was to place the holders of said warrants in the place and stead of said Van Norden. The complainant being subrogated to all the rights of Van Norden, the question then is, what rights did he have in the premises? Did he, among other things, have the right to a completion of the drainage system? or, rather, its non-abandonment and destruction to the end that his purchase warrants might be paid?

The city under the bill of sale had become the owner of the contract, with full subregation of all the rights of the contractor, the possessor of the plant wherewith to complete the work of drainage, and by said act of the Legislature of the 24th of February, 1876, she had become *alone* vested with the right and power to do all work of drainage, and she had become such owner, possessor, and become so vested, because of the issuance and delivery of drainage warrants payable out of drainage taxes, and as the subsequent litigation shows (Davidson vs. New Orleans, 34 An. 170) the payment of said taxes was dependent on the doing of the drainage work and the benefiting the land thereby. With this sole right and power to do this work, and the equipment and qualification wherewith to do it, there was an equity; nay, more, there was an imperative duty toward Van Norden that the work should be done to the end that the purchase obligations might be paid. The doctrine, as declared by the United States Supreme Court, in Supervisors vs. United States *ex rel.*, 4 Wall. 435, is directly in point:

"Where power is granted by statute to public officers in

permissive language—as they *may*, if deemed advisable, do certain things—the language used will be regarded as peremptory when the public interest or individual rights require that it should be done." See, also, City of Galena vs. Arny, S. W. 708.

Independent of any covenant, it was the duty of the city to complete the system, or construct some other, to render the taxes available and valuable, to the end that the warrants dependent thereon might be paid.

Now how has this duty been discharged? The bill in substance declares that the moment the city became vested with the above right and power, and qualified by the ownership of the drainage plant to do the work, she disregarded all of her duties in this behalf, sat down on the whole work of drainage, neither completed the system then two-thirds completed, never devised or completed any other system, allowed the canals already dug to fill with sediment and become worthless, and, in fact, destroyed the work already done, and because of this condition of things the drainage taxes have become of no avail, and are constantly being erased by the State courts. The city does nothing, keeps the property she purchased, never offers to return it, destroys the fund out of which it is to be paid for, provides no other fund and pays nothing. Surely it can not be that she is not responsible in this case.

It is true that the question as to whether, if the work had been done the lands would have been drained and made valuable was discussed in the Peake case and the court declared the evidence was far from satisfactory on that point, but the court put its decision on another ground, to-wit: that the only party who had any right to complain of the conduct of the city was not Van Norden's creditors, but Van Norden himself, who now, through complainant, his assignee, complains and seeks redress therefrom; but in the preparation of the Peake case this question was but incidentally entered upon, as it was believed the city was indebted to the drainage fund on the assessments on its streets in an amount sufficient to pay the class of warrants upon which that suit was based, to-wit: work warrants. But whatever omissions there were in

the evidence on this point in that case, they are fully supplied by the averments of the bill herein, which sets out the plan in detail and shows that if completed it would have rendered the land fit and useful for either agricultural, residence and business purposes, and made it of many times the value of all drainage taxes imposed thereon, and said taxes collectible and available for the payment of said purchase warrants.

3. And since the purchase on the 7th of June, 1876, pursuant to said act of the Legislature, the city of New Orleans ceased in any manner to be an involuntary and non-contractural trustee, and from said date became a voluntary and contractural trustee. Act No. 16 of 1876 gave *permission* to the city of New Orleans to buy, but did not *compel* her to buy out Van Norden and the Canal Company. She was vested with *discretion*, and nothing more. The first section authorized the purchase; the second declared that in case it should be deemed *advisable* to make said purchase, then she should provide for the appointment of appraisers, to appraise the value and rights of the property to be purchased, etc. It was a matter of the clearest *discretion* and *volition* that runs all through the act. In the exercise of this *discretion* the city appointed its own appraiser (p. 134), who made the appraisement (p. 117), and in the exercise of the same *discretion* she made the purchase in question, and she did one thing more. She entered into a covenant *voluntarily*, whereby she contracted—

"Not to obstruct or impede, but on the contrary, to facilitate, by all lawful means, the drainage assessments as provided by law until said warrants have been fully paid, it being well understood and agreed by and between the parties hereto that collections of drainage assessments shall not be diverted from the liquidation of said warrants and expenses under any pretext whatever until the full and final payment of the same."

How has this *voluntary* and *contractural trustee* discharged her obligations? She not only sat down on all the work of drainage as already shown, rendering the taxes uncollectible and unavailable to pay the obligations given for the property delivered to her, and never since offered to return it, but she

has done more. To complete the destruction of the drainage fund, and render the payment of the purchase warrants worthless beyond all doubt, in April, 1881, she passed an ordinance through her common council instructing the mayor to issue, and in pursuance thereof he did issue and publish, his proclamation advising drainage taxpayers not to pay their taxes, to the great injury and destruction of said fund, and by reason of her not completing the drainage system, or adopting and completing any other system, the Supreme Court of Louisiana (34 An., p. 170) decided said drainage taxes could not be collected, which decision has become the settled jurisprudence of the State, under which large amounts of taxes have been erased and canceled and all the balance rendered of little or no value; and in the further prosecution of the purpose to destroy said drainage fund said city, in May, 1883, by a report of a committee of its council duly published, pointed out to its drainage taxpayers how under said Davidson decision they might get rid of said drainage taxes, to-wit: by bringing proceedings against said city to have said taxes canceled, alleging the drainage work had not been completed, and that because thereof said taxes could not be collected, which programme has ever since been largely availed of and large amounts have been lost; and when said proceedings were brought the city made no defence whatever, but the same were allowed to go by default, and that in other ways and by other means she has destroyed said drainage tax fund, and discouraged and advised against the payment thereof, until now, as far as the courts of Louisiana are concerned, the same have become unenforceable and worthless to the holders of the warrants given for the aforesaid purchase (pp. 16, 17, 18 and 19). Surely for these wrongs there must be a remedy.

4. The duties and obligations under act of February 24, 1876, and under the act of sale were placed directly on the municipality of New Orleans and not on the Board of Administrators, as under Act 30 of 1871.

Under Act 30 of 1871, the duties therein created were not placed directly upon the municipality of New Orleans, but rather upon the "Board of Administrators" of said city, as will clearly appear from an examination of said act.

The exact location of the protection levee to be built and of the canals adjoining said levees on the inside thereof was to be determined by said "Board of Administrators," who were also to fix the location and dimension of all other canals. Said "Board of Administrators" were also required to build and run all the pumps and draining machines necessary to lift the drainage water from said canals into Lake Pontchartrain. And it was the duty of the city surveyor or an engineer appointed by said "Board of Administrators" to measure the work done, and it was the duty of the Administrator of Accounts to draw the drainage warrant on presentation to him of the certificate of said engineer appointed by said "Board of Administrators," and said warrant it was the duty of the Administrator of Accounts to pay or to endorse thereon the date of presentation should he not be in funds at the time.

It was said "Board of Administrators" that was subrogated to all the rights, powers and facilities created under the previous drainage acts and all claims for drainage were to be transferred to said "Board of Administrators," and said "Board of Administrators" were authorized and directed to collect in such manner as they might designate, provided they were collected in time to pay said warrants, all assessments and judgments for drainage, and all money collected by said "Board of Administrators" was to be placed to the credit of said canal company, and finally, all the rights, powers and facilities possessed and enjoyed by said "Board of Administrators of New Orleans" were to be liberally construed.

The above distinction was noted and stated by the Supreme Court in the case of Peake vs. New Orleans, 139 U. S. R., page 351, as follows:

"Indeed, the statute connects rather the officers of the city than the city itself with the work. It is true the act provides that the title to the lands necessary for the works shall be procured and held for the benefit of the city of New Orleans; but it requires that such title shall be so procured and held by the Board of Administrators of the city. It also

provides that the extent and nature of all improvements shall be designated by such board; and that such board shall be required to build and run all works and drainage machines necessary to lift the water from the drainage canals over into Lake Pontchartrain, and to do all other work necessary to facilitate the work of the contractor selected and employed by the State. The Administrator of Accounts was directed to draw the warrants on the Administrator of Finance for work done. All the assets and assessments accumulated and made under the prior statutes were transferred to the Board of Administrators of the city. The prior assessments were confirmed and made exigible at such time and in such manner as the Board of Administrators might designate; and such board was authorized to make an assessment of two mills per superficial foot. So that, while the title to the act is "to provide for the drainage of New Orleans," and while the city comes into the statute as a party to be ultimately benefited, and whose officers are charged with the administration, yet nowhere in its sections is the burden and duty of the work cast upon the municipality as such. The paramount idea of the statute seems to be not the casting of a duty upon the city, to be discharged in such manner and by such means as it shall select, but rather to transfer from the boards of the original draining districts to certain officers and agents of the city the duty of carrying into effect the drainage system.

"We do not mean to be understood as affirming that no duty or liability was cast upon the city by this statute as such, or that the action of the City Council thereafter and on April 27, 1871, was not within at least the implication of the statute. All we mean to say is, that neither the full power nor the general duty was cast upon the city, and that the designation of its Board of Administrators as the agency to carry on the work of drainage already undertaken by statutory direction by the local boards of separate districts placed upon the city only a limited responsibility for that which such board might do or omit to do."

The duties prescribed under Act No. 16 of 1876 are in marked contrast with the above. In that act nothing is required of the "Board of Administrators of the city of New Orleans," and no duties are placed on them. That act is one—

"To authorize the city of New Orleans (not its Board of Administrators) to assume exclusive control of all drainage

works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi & Mexican Gulf Ship Canal Company, and its transferee, and to provide for the manner of making said purchase and for paying therefor in drainage warrants."

The Common Council of the city of New Orleans (not the Board of Administrators of said city) was authorized to contract for the rights, franchises and privileges of said canal company and its transferee; also for the purchase and transfer to said city of New Orleans—the municipality, and not the Board of Administrators thereof—of all boats, implements, machinery, etc. The City Council—not the Board of Administrators—was to provide by ordinance for appointment of an appraiser, and all amounts agreed to be paid were to be paid in drainage warrants by the *city of New Orleans*, in the form and in the manner of those issued under Act 30 of 1871, and thereafter the *city of New Orleans* was to have control of all rights, powers and franchises under Act 30 o 1871, and thereafter said *city of New Orleans* alone should have all power of dredging, ditching, draining, etc.

Acting under this authority the *city of New Orleans*, by its Common Council, adopted an ordinance appointing its surveyor to make an examination of the above property, and to report to the committee of the whole the condition of the property of said canal company and its transferee, and also upon certain damages claimed (p. 134).

And when the terms were agreed upon the Council of said city of New Orleans authorized and instructed its Mayor to enter into a notarial act of sale for the purchase of the rights and property of said canal company and Van Norden, its transferee (pp. 134 and 135), and in pursuance of said authority said Mayor, said canal company and Van Norden, its transferee, did grant, bargain, sell and convey to said *city of New Orleans* all the rights and property above named, to hold the same unto said *city of New Orleans* forever, all for $300,000 of drainage warrants, and $20,000 of the same warrants for alleged misappropriation of drainage tax collections, and thereupon said Mayor promised, bound and obligated, not the

Board of Administrators, or any of them, but said city of New Orleans, not to issue any other warrants; not to obstruct or impede, but, on the contrary, to facilitate, by all means, the collections of drainage assessments as provided by law, until said warrants should be fully paid, it being the understanding and agreement by and between said parties to said act, that collections of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any *pretext whatever until the full and final payment of the same* (pp. 125 to 136).

As to the purchase warrants and those issued in compromise of an alleged misapplication of funds collected, nothing was required to be done by the Board of Administrators of New Orleans, and nothing was done by them, although said Board of Administrators were in existence, just the same as they were when said Act No. 30 of 1871 was passed and drainage work was done and drainage warrants issued therefor. The act last named provided for action by the *Board of Administrators*, the other for action by the *municipality itself*, and that municipality bought the property, issued the drainage warrants and delivered them for the property it acquired. The authority given, was to the *municipality*, and the action had under said authority was by *the municipality*, which is the defendant herein.

All of these distinctions the court declined to notice, and the consideration of which would have shown the Peake case was no authority for the defendant in this case.

FIFTH POINT (ELEVENTH ASSIGNMENT OF ERROR).

It was error to hold that the bill could not be maintained because a receiver had been appointed, as well as to dismiss it because of said appointment without qualification.

The only showing that a receiver ever had been appointed is the allegation in the bill that defendant was accountable to the holders of drainage warrants for her administration of the drainage taxes "between the time she took charge in June, 1871, to the time a receiver was appointed * * * in June, 1891, and more especially between the date of sale

by Van Norden and the canal company on the 7th June, 1878, to said 13th June, 1891."

There is no allegation or intimation anywhere that a receiver ever qualified or entered upon the discharge of his trust, or was ever competent to receive, or ever did receive the trust property in his possession or management. In fact the allegation is quite insufficient for any other purpose than to show an order for the appointment and nothing more.

But suppose a receiver had been appointed, qualified, and had taken possession of the drainage assessments, still such appointment, qualification and possession would not prevent this suit by complainant against the defendant independent of the receiver.

In the case of Mercantile Trust Company vs. Pittsburg & Co., 29 Fed. R. 732, the court said:

"The appointment by this court of the receivers did not oust the jurisdiction which the court of common pleas had previously acquired of the proceedings against the railroad company instituted by the petitioner for the ascertainment of his damages, nor did it operate as a stay thereof. Neither was the petitioner bound to bring in the receivers as defendants, as he was seeking no relief against them. It was their business to intervene and take defence if they wished to do so. (High, Rec., Sec. 258-260; Tracey vs. First Nat. Bank, 37 N. Y. 523.) The master was therefore correct in his determination that the petitioner's rights as a judgment creditor are not to be denied recognition simply because he proceeded in the prosecution of this suit without making the receivers parties, or notice to them, and without leave of court."

In the case of the Bank of Bethel vs. Pahquioque Bank, 14 Wall. 383, there had been a receiver appointed, qualified and taken possession of the assets of the defendant, and thereafter suit was brought against said defendant in the State court ignoring the receiver. Among the defences was the one—

"That it could not be sued because it was at the time under the control and in the possession of a duly appointed receiver, incapable of self-defence, and entitled to the legal protection and guardianship thrown about it by the law."

The judgment of the lower court was against the plaintiff,

who took a writ of error, and among other matters assigned the action of the court on the above defence an error, but the judgment of the lower court was affirmed.

And here it is to be observed that there is no intimation anywhere that the city of New Orleans has ever accounted as trustee and been discharged, or that her trust has at any time terminated, but, on the contrary, the present suit is for such accounting, and until the trust is ended, it is regular and proper for a party interested in said trust to call upon her for such an accounting, and especially for a party who became interested by being an owner of drainage warrants given for the purchase on the 7th of June, 1876, and without making the receiver a party, even if he has been appointed, qualified and taken possession of the trust property, which latter does not appear in this case.

But there is another, and in our opinion, a complete answer to the proposition that the appointment of the receiver in this case operated as a discharge of the city of New Orleans from her liability to the complainant and as a bar to the filing of this suit. The right of action asserted by the complainant in this case is solely vested in him as the holder of these drainage warrants, because the liability of the city arises, not from the fact that she owes any drainage taxes to creditors generally, but out of an equitable estoppel which forbids her to plead the discharge of that indebtedness as against the complainant who holds a particular class of warrants. The complainant has not transferred this right to the receiver, nor has the city of New Orleans surrendered the fund here sought to be reached to such receiver, nor had the court power to vest the complainant's rights in the receiver appointed at the suit of Peake. So far, therefore, as the receiver is concerned he can not demand any part of the drainage taxes from the city of New Orleans by virtue of an equity here claimed by the complainant; the only right which the receiver has is to collect the assets belonging to the drainage fund. According to the contention of the city, however, she has been discharged so far as the mass of common creditors are concerned from all liability by the decision in the Peake case. The

right of complainant to be satisfied of his debt out of a fund which this court as a court of equity is asked to establish by the enforcement of an estoppel personal to the complainant is clearly not an asset belonging to the receiver, and as this asset can not be recovered by the receiver, his appointment can in no way affect the rights of complainant. The complainant is suing for nothing that the receiver can demand of the city by suit or otherwise.

Again. It is very clear from the bill that the only assets of the drainage fund are drainage taxes, levied in part by the drainage commissioners and in part by the Board of Administrators of New Orleans and now uncollected, and under the authority of Thompson vs. Allen County, 115 U. S. R. 550, a court of chancery has no right to appoint a receiver to collect a tax. In that case it was contended that the court could not levy a tax—it could compel the collection through an officer of its own appointment; but the court held to the contrary, and said, at p. 558:

"But though the question was not then decided and is urged upon us now, we see no more reason to hold that the collection of taxes already assessed is a foundation of a court of equity than the levy or assessment of such taxes."

But should the contention that this case could not proceed because of the appointment of a receiver be sound, still the decree is wrong because it dismisses the bill unconditionally with costs. The only judgment that could have been rendered on the theory contended for should have been a judgment without prejudice.

The law on this subject is stated in Beach on Receivers, Sec. 707, as follows:

"At most, such appointment will only render the suit defective, so as to make it irregular for the plaintiff to proceed until the receiver is brought before the court by a supplemental pleading in the nature of a bill of revivor. Even if such subsequent appointment of a receiver constituted a valid defence, it could not be pleaded as a bar to the suit generally, but should be pleaded merely in bar of the further prosecution of the suit in analogy to the form of pleading in similar cases in suits at law." Citing Wilson vs. Wilson, 1 Barb. Chan. 592.

SIXTH POINT (FIRST AND SECOND ASSIGNMENTS OF ERROR)

That the decree dismissing complainant's bill with costs was erroneous.

The administration of the defendant having been as heretofore shown, and she having voluntarily entered into said contract of purchase, and having, by her subsequent acts of omission and commission, rendered the drainage taxes of no avail and uncollectible and useless for the payment of the purchase warrants, she can not now be permitted to urge any offset against the drainage taxes due by herself, thus leaving nothing to pay said purchase warrants, and especially when the defendant retained possession of the property purchased until it ceased to exist by reason of her want of care, and when she has paid absolutely nothing therefor.

It will be observed by reference to the extract from the assessment rolls for the Second Drainage District, parish of Jefferson, homologated on the 16th of March, 1869 (pp. 64 and 65), the assessments are made against the city of Jefferson, city of Carrollton, and the police jury of the parish of Jefferson, etc., but these assessments became and are debts due by the city of New Orleans.

On the 16th of March, 1870, a new charter was granted to the city of New Orleans (Act 7 of 1870) and the territory subject to said charter was increased so as to extend to the lower line of the city of Carrollton and embraced the territory formerly known as the city of Jefferson, and the 34th section of said new charter vested all the right, title and interest of said city of Jefferson as then existing in and to the property in said act described in the said city of New Orleans as incorporated in said act and declared that all indebtedness and liabilities of said city of Jefferson should be assumed and paid by said city of New Orleans as constituted and incorporated by said act, and declared her liable therefor.

On the 23d March, 1874, the city of New Orleans was again extended (Act No. 71 of 1874) so as to take in the city of Carrollton, and the 5th section of this act, after declaring

hat all the right, title and interest of said city of Carrollton as then existing in and to certain property in said section described further declared that all the debts and liabilities of said city of Carrollton should be assumed and paid by said city of New Orleans.

The above acts embraced all the territory of that portion of the Second Draining District lying within the parish of Jefferson and made it subject to the dominion of the city of New Orleans. This fact alone, independent of any statutory provisions, made the city of New Orleans liable for the debts assessed against said city of Jefferson, city of Carrollton, and the police jury of said parish of Jefferson.

See Watson vs. Mobile, 116 U. S. R., p. 289, and cases there cited. The decree of the lower court should be reversed with costs.

Respectfully submitted,

RICHARD DEGRAY,
ROUSE & GRANT,
Solicitors for Complainant.

167-467

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 364.

JOHN G. WARNER

versus

CITY OF NEW ORLEANS.

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SECOND ADDITIONAL BRIEF.

The undersigned, in connection with the brief heretofore filed, desires to submit to the consideration of the court the following opinion of one of the members of the New Orleans bar, learned in civil law, on the point of error of law in the contract of sale from Van Norden to the city of New Orleans:

The question of error, whether of law or fact, must be examined with special reference to the contract between the city of New Orleans purchasing and Van Norden selling the properties for which the drainage warrants were stipulated and delivered. It is at the threshold one of applicability; that is to which contract it applies, and in what manner and to what extent. Conceded that at the date of the contract of 7th June, 1876, the city and Van Norden did not know that the former had rights against the drainage fund sufficient to absorb, possibly, the whole amount, did that error operate directly or in-

directly upon the stipulations of that contract? The error must "*relate to the contract*" *itself*, to that which forms the mutual obligation. C. C., Art. 1823 (1817). It is only when the error bears upon the "*concurrence of intentions*," as stipulated in the agreement, that error vitiates *the* contract. C. C., Art. 1819 (1813.)

"But" says the text, "it is not every error that will invalidate it. To have that effect the error must be in some point which was a *principal cause* for making the contract; and it may be either as to *the motive* for making the contract, to the person with whom it is made, or to the *subject matter of the contract itself*. Whether the error be as to the *principal cause*, the *motive*, the *person*, or the *subject matter*, it is obvious that this relates exclusively, to the *contract itself*, and not to the cause, motive or subject matter of any other situation. How could a matter of error vitiate a contract when error does not go to its vitals?

The mutual ignorance that the city of New Orleans was a creditor of the drainage fund at the time that she contracted with Van Norden must (in order to constitute an error fatal to the validity of *this particular contract*) impinge upon one of its four requisites under C. C., Art. 1823 (1817).

Obviously there was no error in the motive, C. C., Art. 1825 (1819): "The error in the cause of a contract to have the effect of invalidating it, must be on the *principal cause*, when there are several; the principal cause is called the *motive*, and means the consideration, without which the contract would not have been made."

The city does not pretend—nor can she—that, had she known that she had a creditor's claim against the drainage fund, she would not have contracted at all with Van Norden under the provisions of Act No. 16 of 1876. The reverse is the case; for instead of being an *objection* to the course she pursued, it would have been an *inducement*. And that is demonstrated beyond peradventure.

Suppose that in 1876, she was cognizant of her rights as creditor, when said act of that year was passed, "To authorize her to assume exclusive control of all drainage works" and the drainage rights and property, "paying therefor in drainage warrants" this and prior acts make the

city of New Orleans trustee in the premises, and vest in her all the drainage powers in the drainage districts, whether a creditor or not. Of course she became a trustee for all the creditors of the drainage fund; and she being herself a large creditor, was essentially benefited by this trusteeship. As trustee she would manage for her own benefit as creditor, without fear of abuse or fraud on her part as trustee to the injury of herself as creditor. Her position then, although not technically that resulting from *antichresis* under C. C., Art. 3176 (3143), yet confers upon her the delivery of the property, "with the right of reaping the fruits or other revenues." Therefore holding under her administration all the properties, paraphernalia and privileges of the drainage fund, that was an additional protection to her rights as creditor: hence an inducement to contract as she did.

She did not refuse to avail herself of the provisions of the act of the Legislature of 1876, as she could have done, but she voluntarily complied with that enactment and exercised the discretion vested in her thereby.

As trustee and vested with the full power for drainage purposes, she represents the delegated authority of the State; and, in discharging these functions, she husbands the drainage resources practically to insure the satisfaction of her rights as creditor herself as those of others.

Therefore, there was no error in the motive or cause and consideration of the contract; and whether a creditor or not a creditor at the time, or whether she, at the time being a creditor, did not know she was a creditor, that circumstance could have no adverse influence upon her complying with the statute of 1876. Quite the contrary, as above explained.

But what is the extent of the error in its bearing on the consideration and subject matter of the contract under discussion? What rights had the city as creditor of the drainage fund *quoad* the subject matter on the contract?

As creditor the city had simply the right to be paid from the drainage fund; but that did not make her the owner of properties and rights, which she subsequently acquired from Van Norden. Her ownership dates and results exclusively from the acquisition subsequently made by her. If she had, as creditor, any privilege on the properties in

question, then by the subsequent purchase and acquired ownership the privilege was destroyed by confusion. (C. C., Art 3277, ([3244]). "Privileges become extinct—2d. By the creditor acquiring the thing subject to it." It stands to reason that one can not have a mortgage or privilege on his own property. (C. C. 3156 [3153] 3278 [3245]).

The city then remains an ordinary creditor of her original debtor, with no right of mortgage or privilege, at least as regards the property which she acquired. She may look to the trustee—to herself as trustee—for payment as ordinary creditor. It would be preposterous for her to purchase under the act of 1876 for a valuable consideration and still holding to the acquisition, claim the right to repudiate the stipulated consideration. The very statute by the authority of which she made the purchase imposes the obligation of payment. She could not repudiate this obligation, and go on with her trusteeship to gather to the last the proceeds of the speculation. She can not at the same time occupy inconsistent, contradictory and conflicting positions in the same transaction.

Having in this instance contracted, while she was at the same time trustee, she can not nullify the contract and retain its fruits. The least she can do if she repudiates the alleged transaction by reason of error in making the agreement is to reinstate, at once, matters as nearly as they can by possiblity be done. That is the inevitable result of vitiating the contract by reason of error, if the error alleged goes to the validity of the contract.

She is placed in this dilemma: either the sale is valid or it is not. If valid, then plaintiff's claim must be satisfied. If not valid, then there is no contract, and the city must make restitution.

Restitution is the legal and moral result of dissolution. C.C., Art. 2561 (2539). The city refuses to pay the price of the drainage warrants; then she must either tender back, and effectually, the objects if in existence; and, if not in existence, then supply the loss by payment of adequate damages. C.C., Arts. 1926 (1920), 1928 (1922). If the objects are not susceptible of delivery, the best and most direct test is the value put upon them in the contract; to-wit, the face value of the warrants.

The rule in this respect is substantially the same in the Civil Law and in Chancery. Indeed the latter borrowed the system from the former. In Lavine vs. Michel, 35 An. 1226, the Supreme Court of Louisiana held:

"It is not denied that, under the Roman as well as under the common law, obligations to do or not to do, arising from contracts, were enforced, not specifically, but only by way of damages. The maxim was, '*Nemo potest proecise coji ad factum.*'

"The like rule was expressly embodied in the Napoleon Code, of which Art. 1142 provides: '*Toute obligation de faire ou de ne pas faire se résout en damages et intérésts, en case d'inexecution de la part du débiteur.*'

Our own Code, however, contains the following provisions:

"'Art. 1927. In ordinary cases the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to specific performance by means prescribed in the laws which regulate the practice of the courts.

"The reader of the articles must be struck with the perfect similarity of the ground stated for relief, viz: where damages 'would be an inadequate compensation' to the main foundation of equity jurisdiction of specific performance under the English law, viz.: where the legal remedy (which is damages) would be inadequate. 2 Story on Eq., Secs. 718, 719; 1 Fonbl. Eq., Bk. 1, Ch. 1; Fry on Spec. Perf., Sec 11, etc.'

"In determining, therefore, what are the proper cases for specific relief, the equity jurisprudence of England and this country may be instructively consulted. How far our courts should follow that jurisprudence is a question to be determined in cases as they arise."

Respectfully submitted,

RICHARD DEGRAY,

Solicitor for Complainant,

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UNITED STATES CIRCUIT COURT OF APPE

FOR THE FIFTH CIRCUIT.

No. 364.

JOHN G. WARNER

versus

THE CITY OF NEW ORLEANS.

RICHARD DeGRAY,
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It was suggested at the argument that the rights of the parties to this controversy, and perhaps the remedy, might be affected by a supposed error of law on the part of both Van Norden and the city of New Orleans, or one of them, in the contract of sale of the drainage plant. In our view of the matter, however the error, if any, was not mutual, but if it was, that fact does not affect the liability of the city to pay in the manner contemplated by the contract, to the extent of her indebtedness to the drainage fund, as assessee of the streets and squares, for in this way only can she now repay the consideration of the sale, the drainage boats, machinery, etc., having as the bill avers and the demurrer admits been in part sold, and in part become valueless from use, neglect, and time. The general rule is that when both parties are in error, as in case of the purchase of a horse which, unknown to both the contracting parties, was at the time of the sale dead, the purchaser will be relieved by rescinding the contract if the price has not been paid, or if paid by decreeing the money paid back. Allen vs. Hammond 11 Peters, 63; 1 Story's Eq., Sec. 142B.

But as neither party asks for a rescission of the contract in this case, and it would be impossible for the court to reis-

state the parties in their rights as they existed at the date of the sale, even if one of them desired to rescind, a court of equity ought to affirm the contract, as a matter of bare justice, which it can do in this instance, by directing the payment of the price as originally contemplated by the parties themselves out of the drainage fund, at the same time ordering the city to replenish that fund to the extent of the amount she owed to it at the date of the sale. Courts of equity may always, and it is their duty to adjust their decrees to meet the circumstances of each case as presented for the purpose of doing justice between the parties. 1 Story's, Eq. Jur., Secs. 27-30.

But we submit there was no error by either party as to the principal object or cause of the contract. One party sold and the other purchased property in existence, upon an appraised value, and it was delivered to the purchaser, who was and is satisfied with the quality of the property, and the title, and there is no mutual error of law or fact. The error, if any, was that of the city of New Orleans in the collateral stipulation to pay the price out of a fund which, it is now assumed, had been extinguished by the issue of bonds, of which fact, as a matter of law, she was ignorant at the time.

"Error in law as well as error in fact invalidates a contract where such error is its only or *principal cause*, subject to the following modifications." C. C. 1846.

"The error in the cause of a contract to have the effect of avoiding it must be on the *principal cause* when there are several; the principal cause means the *motive*, and means that consideration without which the contract would not have been made." C. C. 1825.

Here, clearly, the principal cause or motive of the city was the acquisition of the drainage plant and the franchise owned by Van Norden, to enable the city to carry on the drainage herself, the manner of paying the price being only an incident of the transaction.

Take for illustration the case of the sale of a ship, in which it is agreed in the contract that the price shall be satisfied by the check of the vendor payable out of a deposit which he believed he had in a particular bank, but which in fact had no existence, or which unknown to him had been extinguished by operation of law before the

sale; the ship is clearly the principal if not the only cause of the contract, and the vendee can not avoid his obligation to pay the price under the pretence that the purchase was made in error of the state of his finances. The principle governing such cases is that a party buying property to be paid for out of a designated fund is bound to know that he actually has what he professes to give. Allen vs. Hammond, 11 Pet. 63–67.

Article 1846 of the Civil Code with wise prevision places some other restrictions on the right of parties to claim relief on account of error of fact or in law, even where the error relates to the principal cause of contract. Thus it declares, that though a party may have been ignorant of his rights, yet if the contract fulfils some natural obligation, such error shall not avoid it. And it further declares that error of law can never be alleged to acquire (property), though it may be invoked, as a means of preventing a loss, or recovering what was given or paid under such error. The illustrations given on the article show the morality of the law, but do not restrict the application of the principle to the instances cited. This article relates only to cases where a party contracts to discharge an obligation which he did not in law owe, at the date of the contract. D'Aguesseau, in his dissertation on *Mistakes of Law*, printed in the Vol. 2 of Pothier on Obligations, p. 350, says:

"Error of law ought not to give any person a title of acquisition; the reason is evident, and Cujas comprises it in his Commentary on Law 8 ff *de juris facti ignorantia*, otherwise an ignorance of law would be an advantage to the person making the mistake. * * Hence those solemn definitions of the law; ignorance of the law does not profit those who are desirous of acquiring an advantage."

Domat, after declaring that error of law is not sufficient, as an error of fact is, to annul contracts, says:

"(1) If error or ignorance of law be such that it is the *only* cause of the contract in which one obliges himself to a thing to which he is not otherwise bound, and there be no other cause for the contract, the cause proving false, the contract is null. (2) This rule applies not only in preserving the person from suffering a loss, but also in

hindering him from being deprived of a right which he did not know belonged to him. (3) But if by an error or ignorance of the law one has done himself a prejudice which can not be repaired without breaking in upon the right of another, the error shall not be corrected to the prejudice of the latter."

See note at foot of Sec. 139, Vol. 1, Story Eq. Jur.

"Mere mistakes of the law," says the Supreme Court in Griswold vs. Hazard, 141 U. S. 284, "stripped of all other circumstances, constitute no ground for the reformation of written contracts, yet the rule is that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases."

But the general rule is, both in this State and elsewhere, that the error must have been induced by the fraud and misrepresentation of the other party to the contract. Here instead of being the cause of the city's error, Van Norden is sought to be made its victim.

Nor can it be said that when the Legislature passed the act approved February 24, 1876, authorizing the city to buy out Van Norden, said Legislature was ignorant that $1,600,000 of the bonds of the "Drainage Series" had been issued. It had passed Act No. 73 in the year 1872, allowing said bonds to be issued, and thereafter the presumption was that they would be issued, and in fact that they had been issued. And this presumption in this case is equal to knowledge itself. In United States vs. Des Moines, etc., 142 U. S. R., p. 544, the court said:

"The knowledge and good faith of a Legislature are not open to question. It is conclusively presumed that a Legislature acts with full knowledge, and in good faith. It is true the bill alleges that its passage was induced by the navigation company, by false representations and threats of suit; but such an allegation amounts to nothing. In Cooly's Constitutional Limitations (5th ed. 222) the author, citing several cases, observes: From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the Legislature in the particular case, in respect to the subject matter of

the act, the manner in which its object is to be accomplished and the mode of enacting it, has kept within constitutional limits and observed constitutional conditions. In any case in which this question is answered in the affirmative, the courts are at liberty to inquire into the proper exercise of the power. They must assume that the legislative discretion has been properly exercised. *If evidence was required it must be supposed that it was before the Legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding.* And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the Legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon. See also Fletcher vs. Peck, 6 Cranch, 87; Ex parte McCardle, 7 Wall. 506; Doyle vs. Continental Insurance Co., 94 U. S. 535; Powell vs. Pennsylvania, 127 U. S. 678."

Such being the law, what possibly can be urged against this appropriation by the Legislature of the drainage fund to pay the warrants given for this purchase? Certainly not this issue of bonds of the "Drainage Series," for the very law under which they were issued, after providing for said issue, and declaring they should be marked "Drainage Series," declared:

"And all taxes collected for drainage, *and not required for the payment of drainage warrants*, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

Therefore, whether the Legislature knew or not of their issuance, at the time of the passage of the act authorizing said purchase, was a matter of no moment, for by the law of their creation these bonds are made, in the matter of their payment, second to drainage warrants.

We have shown by the general jurisprudence of the country that the city warranted, both expressly and by implication, the existence of the drainage fund. We will now show that the principles of the civil law of Louisiana —which controls this contract—are even more favorable

to our rights than the common law. We think the mode adopted for the payment of the price in the act of sale must be considered as a transfer or *quasi*-sale of an incorporeal right in satisfaction of the price. Under the title of the Civil Code relating to the *Assignment for transfer of civil credits and other incorporeal rights*, C. C , Art. 2646, says:

"He who sells a credit or an incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the deed."

The warranty exists even though no warranty be expressed in the instrument of transfer. Toler vs Swayze, 2 An. 880. Even in case of stipulation of *no warranty*, "an assignment without any recourse or claim whatsoever against the vendor," the seller, in case of eviction, is liable for the restitution of the price, unless the buyer was aware, at the time of the transfer, of the danger of eviction—that it was aware that any realization on the transfer was a mere matter of hazard and chance —and purchased at his peril and risk. Civil Code 2505; Corcoran vs. Riddle, 7 An. 268; Jenkins vs. The Parish of Caddo, 7 An. 559; Johnson & Co. vs. Boise & Frelson, 40 An. 273.

In the latter case it was decided that when a transferrer of judgment sells all his rights to it, and to all suits growing out of it, he warrants the *existence* of the debt at the time of the transfer, and that if the debt had been *extinguished* and was not in existence at the time of the sale—the very pretence of the defendant here—the vendor is bound for the price. That is if the restitution or satisfaction can be paid in money and if not, the parties are remitted to the general law regulating courts of justice in the affirmance or performance of contracts. Article 1937 of the Civil Code states it thus:

"In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the *power* of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

As was shown in Levine vs. Mitchel, 35 An. p. 1121, this is in accord with the equity jurisprudence on this

subject. See cases there cited, and especially Secs. 717, 718, Story's Eq.

Warrants of this character, like checks against funds in a bank, operate as a transfer and equitable assignment of the fund to the payee, *pro tanto*, and give the holder a right of action to recover the amount.

In this respect the law of Louisiana differs from the common law. See Gordon & Gomilla vs. Muchler, 34 An. 604, for a full exposition of the law on this subject. All that is necessary to complete the assignment was presentation or notice thereof, which in this case is endorsed on the warrant by the party on whom it is drawn. The assignment of the fund to the extent of the amount of the warrants is complete, and under the authorities last above mentioned the warranty is also complete.

But the common law authorities make a distinction between orders drawn against funds generally in the usual course of business and those drawn against a special fund, which by the contract of the parties has been specially appropriated to their payment, the courts of Great Britain holding that the latter class of orders amount to an equitable assignment, but that the former do not. Citizens Bank of La. vs. First Nat. Bank; Law Reports 6, House of Lords 352; English Reports, 7 Moake, 56.

Each warrant given for the purchase price was, therefore, under the law of this State and the principles of the common law, an assignment in favor of the holder of so much of the drainage fund as was necessary to pay the same, and is a warranty also that the fund existed out of which to pay it. Surely after this assignment and warranty the defendant is estopped from thereafter setting up any claim against the drainage taxes by reason of the issue of said bonds.

But if this peculiar transaction does not come under this head this warranty would necessarily be implied as growing out of the very nature of the transaction, as provided in Arts. 1964 and 1965, which articles simply declare the rule of all jurisprudence on this subject, and which are as follows:

"Equity, usage, and law, supply such incidents only as the parties may reasonably be supposed to have been

silent upon from a knowledge that they supposed they would be supplied from one of these sources

"The *equity* intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do to us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity."

But we insist that the covenant of the city, "not to impede, but on the contrary to facilitate by all lawful means the collection of all drainage assessments until said warrants have been paid, and that the collection of drainage assessments shall not be diverted from the liquidation of said warrants," was an express covenant on the part of the city that she would pay the amount assessed against her in any event into the fund to the discharge of the warrants.

Out of this express covenant sprang an implied one that the city would not by any act of her own attempt to destroy the fund, or deny its existence in its integrity as against these warrants. A court of equity ought to treat the city in this case precisely as it would if the bonds in question had not been issued, for even if the city was in error, she should not be allowed to have the error corrected at the expense of Van Norden or the holders of warrants, who stand in his shoes with express subrogation of all his rights.

And there is no obstacle in the way of granting full relief. The discharge of the price was to be in money, or in the obligations of the city and other debtors of the drainage fund, which were payable in money. It might be different if the price was to be paid in a particular piece of property which had been lost and can not be delivered. But even then we think that where the property sold has been appraised and its value fixed, the other party who has failed to deliver the price in kind may rightfully be charged with the price or agreed value of the thing he has received. At least a court of equity can find no difficulty in decreeing relief in this form to the person who has suffered from the default of the vendor.

We expect no relief in this case against the city on the ground that she has caused or permitted the loss of the taxes due to the drainage fund by private persons. The allegations of the bill in this respect are made for the purpose of showing that the warrant holders have no recourse save that of compelling the city to contribute what she owes that fund, which she can not be permitted to say has been lost from any of these causes. The liability to pay the judgments against her, amounting to about $700,000, is settled by the opinion in the case of Peake vs. New Orleans, 139 U. S., page 356; Drainage Co., petitioner, 11 An. 338, 377.

Respectfully submitted,

RICHARD DEGRAY,
ROUSE & GRANT,
Solicitors for Complainant.